Supreme Court, U.S.
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No.

In the Supreme Court of the United States

GERALD PASCHAL AND LISA PASCHAL,
Petitioners,

v.

FLAGSTAR BANK, FSB,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Court of Appeals is precluded from entering judgment as a matter of law on an issue in which the verdict loser failed to comply with the procedural requirements of Rule 50(b) of the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners Gerald Paschal and Lisa Paschal (Paschals) are each individual citizens of the United States, residing in the Eastern District of Michigan. The Paschals were Plaintiffs in the District Court, and Appellees in the Sixth Circuit Court of Appeals.

Respondent

Flagstar Bank, FSB, f/k/a First Security Savings Bank, FSB (Flagstar), is a corporation, which is publicly traded. Flagstar is a wholly owned subsidiary of Flagstar Bankcorp, FSB, a publicly held company. Flagstar was the Defendant in the District Court, and the Appellant before the Sixth Circuit Court of Appeals.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinions (App. B at 3a and App. C at 40a) are reported at *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431 (6th Cir. 2002), 2002 FED App. 0239P (6th Cir. 2002), and *Paschal v. Flagstar Bank, FSB*, 295 F.3d 565 (6th Cir. 2002), 2002 FED App. 0238P (6th Cir. 2002).

The District Court opinion (App. D at 54a) is reported at *Edwards v. Flagstar Bank*, 109 F. Supp. 2d 691 (E.D. Mich. 2000). The District Court also issued an unreported decision. (App. E at 90a).

STATEMENT OF JURISDICTION

The Judgment of the Sixth Circuit Court of Appeals was entered on July 17, 2002. The Court of Appeals entered an order denying a timely petition for rehearing with suggestion for rehearing *en banc* on September 19, 2002. (App. A at 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 50 of the Federal Rules of Civil Procedure. Rule 50 provides:

(a) Judgment as a Matter of Law.

. . . .

(a)(2) Motions for judgment as a matter of law may be made any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

(b) Renewing Motion for Judgment After Trial. . . . If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion

. . .

STATEMENT OF THE CASE

Flagstar's Processing of thePaschals' Mortgage Request

In May of 1992, Gerald and Lisa Paschal, a married couple of African-American descent, contacted Flagstar to obtain a mortgage to finance their purchase an $85,000 home to be constructed in a new subdivision. The Paschals informed Flagstar that they had previously filed for bankruptcy. Flagstar pre-qualified the Paschals for a mortgage under Flagstar's "5FC" loan program, consisting of a $75,000 conventional mortgage, with a down payment of just over 10% and an adjustable 5.625% interest rate.

In Mid-August of 1992, however, Flagstar's underwriter, Gertrude Heenan, proposed a counter-offer to the Paschals for a $55,000 mortgage under a "35C" loan program. The 35C loan program is a "bank-held program" of Flagstar. Other than indicating a $55,000 proposed loan amount, Flagstar's 35C counter-offer did not contain or communicate to the Paschals a specific interest rate, or any other loan terms. Heenan directed that the specific loan terms be communicated to the Paschals in a subsequent meeting at Flagstar's office.

On September 24, 1992, Flagstar removed the Paschals' application from its 35C bank held loan program. Instead, Flagstar placed the Paschals' application into a loan program funded by Investaid Corporation (Investaid), a subprime or "B/C" lender of Flagstar.

On or shortly after September 25, 1992, Flagstar met with the Paschals to address the final loan terms and conditions of the proposed mortgage. During the meeting, a Flagstar loan officer "congratulated" the Paschals on having been "approved" for a $59,600 mortgage, at a 16.490% interest rate, along with $596 in costs and up to 10 points. As noted by the district court, Flagstar knew the Paschals' need for financing, yet offered final mortgage terms that "were so far out of line with what [the Paschals] reasonably needed or could have afforded as to have been illusory." (App. D at 89a).

The Paschals, facing the likely loss of their newly constructed home, hesitated for several days in deciding whether to decline the mortgage. On September 29, 1992, the Paschals, realizing they could not afford paying both a high down payment and large monthly mortgage payment caused

by the 16% interest rate, wrote to decline Flagstar's counteroffer and to withdraw their mortgage application.

The Paschals then contacted the Fair Housing Center of Metropolitan Detroit (FHC). The FHC conducted a series of fair housing tests of Flagstar's lending practices, using White testers claiming to have previously filed bankruptcy. During the fair housing tests, Flagstar repeatedly offered conventional mortgage terms to the White testers, consisting of mortgages of approximately $75,000 involving approximately 10% down payments with mortgage interest rates of approximately 8-10%.

Partial Denial of Summary Judgment Motion Alleging Statute of Limitations Defense

After reviewing the results of the fair housing tests, the Paschals, with other plaintiffs, filed a complaint against Flagstar for mortgage lending discrimination. In their complaint, they sought relief under Sections 805 and 818 of the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §§ 3605 & 3617; the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981 & 1982 (Sections 1981 & 1982); and Section 504 of Michigan's Elliot-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2504 (ELCRA).

The Paschals filed their complaint on September 21, 1995. In September of 1997, at a relatively early point in discovery, Flagstar moved for partial summary judgment on statute of limitations grounds as to the claims of several plaintiffs, including the Paschals. With respect to the Paschals, the district court, in August of 1998, granted summary judgment as to the two-year statute of limitations period applicable to the Paschals' claim under the FHAA. The district court denied Flagstar's motion as to the three-year

limitations period applicable to the Paschals' claims under Sections 1981 & 1982 and the ELCRA. (App. E at 96a).

The case proceeded through a lengthy discovery process involving, among other things, review of hundreds of Flagstar loan files. During this period, the Paschals obtained numerous loan files involving White applicants that had previously filed bankruptcy. In each instance, Flagstar has approved and closed on mortgages for these White applicants on conventional loan terms. Flagstar sent none of the White applicants to "B/C" or subprime lenders.

In early 1999, Flagstar again moved for partial summary judgment. Flagstar did not renew its request for summary judgment as to the Paschals' claims, or otherwise assert a statute of limitations defense.

The case proceeded to a trial. At trial, Flagstar did not mention the statute of limitations. Flagstar also did not ask that issues related to its alleged statute of limitations defense be presented to the jury.

Flagstar's Rule 50(b) Violations as to Its Alleged Limitations Defense

At the close of the proofs, Flagstar moved for judgment as a matter of law (JMOL) for "all the reasons known to the law". Flagstar's generalized JMOL motion did not assert a statute of limitations defense:

> The Court: You are making a motion for judgment as a matter of law, right?
> Mr. White: [Flagstar's counsel] Directed verdict, Your Honor.
> The Court: It's called a judgment as a matter

of law.
Mr. White: Judgment as a matter of law, Your Honor.
The Court: Okay. *For all the reasons known to the law, right?*
Mr. White: *For all those, Your Honor.*

App. D at 85-86a (emphasis added).

The case was then submitted to a jury, which reached a split verdict. The jury rendered a no cause verdict as to three plaintiffs. The jury entered a verdict of $125,000 compensatory damages in favor of Plaintiffs David and E. Stephanie Edwards (Edwardses), and $250,000 in compensatory damages and $325,000 in punitive damages in favor of the Paschals.

Following the jury's verdict, Flagstar submitted a post-trial motion for JMOL or, alternatively, for new trial. Flagstar's post-trial motion did not mention the statute of limitations. The district court found sufficient evidence supporting the jury's findings on liability and damages, and denied Flagstar's post-trial motion. (App. D at 87-89a).

Entry of JMOL on Appeal

Flagstar appealed the district court's denial of its JMOL motion to the Sixth Circuit. Flagstar also filed a separate appeal as to the district court's fee award. On appeal, Flagstar sought to reassert its waived limitations defense.

The panel assigned to the appeals agreed with the district court that sufficient evidence supported the jury's verdict that Flagstar engaged in unlawful mortgage lending

discrimination on grounds of race as to the Paschals and Edwardses. (App. B at 35-37a). The panel, however, held that the "district court erred by denying Flagstar's motion for judgment as a matter of law" on grounds that the Paschals' claims were "barred by the statute of limitations". (*Id.* at 14a).

The panel, in a published opinion, held that "Flagstar preserved [the statute of limitations] issue by moving for [JMOL] at the close of the evidence, predicated on 'all the reasons known to the law.'" (*Id.* at 11a). With respect to Flagstar's post-trial motion, the panel noted that Flagstar also "failed to raise this specific issue when it moved for [JMOL] after the jury rendered its verdict". (*Id.*).

The panel excused Flagstar's failure to comply with the Rule 50(b) requirements, reasoning that appellate review in the Sixth Circuit is not waived if the issue involves a "pure question of law". (*Id.*). The panel then held that the Paschals' claims were barred by the statute of limitations, and that the district court "erred by denying Flagstar's motion for judgment as a matter of law". (*Id.* at 14a).

In a second decision, the panel vacated and remanded the district court's fee award, in view of the panel's entry of JMOL on appeal against the Paschals. (App. C at 41a).

The Paschals timely petitioned for rehearing on grounds that the panel's entry of JMOL on appeal conflicted with this Court's decisions prohibiting appellate courts from entering JMOL on appeal when the verdict loser failed to strictly comply with the procedural requirements of Rule 50(b).

On September 19, 2002, the court of appeals denied the Paschals' petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Conflicts With This Court's Decisions Governing Entry Of Judgment As A Matter Of Law On Appeal.

The Sixth Circuit's decision conflicts with this Court's decisions governing the entry of JMOL on appeal.

A. This Court Precludes Court of Appeals From Entering Judgment as a Matter of Law When a Verdict Loser Fails to Strictly Comply With F. R. Civ. P. 50(b)

As this Court has emphasized, an appellate court may not grant judgment as a matter of law where the verdict loser fails to strictly comply with the procedural requirements of Rule 50(b):

> The opinions in the above cases make it clear that *an appellate court may not order judgment n.o.v. where the verdict loser has failed to strictly comply with the procedural requirements of Rule 50(b)* . . .

Neely v. Eby Construction Co., 386 U.S. 317, 325 (1967)(emphasis added); *Johnson v. New York*, N.H. & H.R. Co., 344 U.S. 48, 52-54 (1952)(rationale for strictly applying Rule 50(b)); *United States v. Generes*, 405 U.S. 93, 112 (1972)(White, J., concurring)("Because of the drastic nature of a judgment n.o.v., this Court has emphasized that such motions should be granted only when the procedural

requirements of the Federal Rules have been strictly complied with.")(citing *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217-18 (1947)). *See also Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000)(characterizing *Neely* as "pathmarking opinion" under Rule 50).

Rule 50(b)'s requirements are plain and unambiguous. *Johnson*, 344 U.S. at 54. Compliance with Rule 50(b) involves two steps. First, Rule 50(b) requires a litigant to specify the law and facts giving rise to a particular defense in its motion for JMOL at the close of evidence under Rule 50(a)(2).

The generalized JMOL motion at the close of the evidence—"predicated on 'all the reasons known to the law'"—is a gross violation of the Rule 50(a)(2) articulation requirement of the "law and facts" on which JMOL is sought. *Weisgram*, 528 U.S. at 454 (JMOL motion "shall specify . . . the law and facts on which the moving party is entitled to judgment.").

Second, Rule 50(b) requires the verdict loser to then *renew* the defense in a post-verdict JMOL motion. JMOL is not available under Rule 50(b) on an issue not brought to the court under Rule 50(a)(2) prior to the submission of the case to a jury. 1991 Advisory Committee Note to Rule 50(b)(post-verdict JMOL motion "can be granted only on grounds advanced in the pre-verdict motion.").

The panel acknowledges Flagstar's post-trial JMOL motion "failed to raise this specific issue", and thus did not comply with Rule 50(b). Entry of JMOL on appeal—in the face of direct and undisputed noncompliance with the procedural requirements of Rule 50(b)—directly conflicts with this Court's established precedent. *Neely*, 386 U.S. at 325;

Johnson, 344 U.S. at 51.

B. There Is No "Question of Law" Exception To Rule 50(b) Requirements.

The Sixth Circuit contends that failure to comply with Rule 50(b)'s requirements permits entry of JMOL on appeal as to issues involving a "pure question of law". (App. B at 11a).

Rule 50(b) "emphasizes the importance of the legal issues". *Johnson*, 344 U.S. at 53. There is no "question of law" exception to its requirements. Rule 50(b), by its plain language, pertains to "legal questions". F. R. Civ. P. 50(b).

Fashioning a "question of law" exception to Rule 50(b) requirements reflects poor policy. Ignoring Rule 50(b) requirements as to issues involving "pure questions of law" eviscerates the Rule 50(b) verdict review standards. Such an approach conflicts with this Court's articulated policy of rejecting any such relaxation of the plain requirements of Rule 50(b) on grounds that it would "reintroduce the same type of confusion and uncertainty the rule was adopted to end." *Johnson*, 344 U.S. at 54.

Moreover, Rule 50(b) violations cannot be avoided by direct review of the denial of summary judgment, thus bypassing Rule 50(b). In its decision, the Sixth Circuit argues that the denial of summary judgment is properly reviewable if it does not require the resolution of any undisputed facts. (App. B at 11a).

The denial of summary judgment is not appealable, on grounds that such orders are merely interlocutory and non-final for appeal purposes. *United States v. Florian*, 312

U.S. 656 (1941); *Switzerland Cheese Ass'n, Inc. v. E. Horme's Mkt., Inc.*, 385 U.S. 23, 25 (1966)(denial of summary judgment "is strictly a pretrial order that decides only one thing—that the case should go to trial").

Further, district courts have discretion to deny summary judgment irrespective of whether factual issues exist "where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

The Rule 50(b) requirements simply are not bypassed with respect to statute of limitations defenses. The denial of a statute of limitations defense is reviewable on appeal only after the defense is presented at trial; properly preserved in a JMOL motion at the close of evidence; submitted to a jury in interrogatories under F. R. Civ. P. 49(b); and then renewed in a post-trial JMOL motion under Rule 50(b). *See, e.g., Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 872-73 (1994)(no interlocutory appeal of a statute of limitations defense); *Agristor Leasing v. Saylor*, 803 F.2d 1401, 1406 (6th Cir. 1986); *Wilson v. International Brotherhood of Teamsters*, 83 F.3d 747, 757 (6th Cir. 1996); *Gandy v. Sullivan County*, 24 F.3d 861, 863-64 (6th Cir. 1994), *aff'g*, 819 F. Supp. 726, 727 (E.D. Tenn. 1993)

C. The Sixth Circuit's Disregard of Rule 50(b) Has Caused Unfair Prejudice.

This Court deems the Rule 50 notice requirements as mandatory so a litigant "could fill the crucial gap in the evidence". *Cone*, 330 U.S. at 217; *see also Weisgram*, 528 U.S. at 454 (presuming that the "party whose verdict is set aside on appeal will have had notice, before the close of

evidence, of the alleged evidentiary deficiency"); 1991 Advisory Committee Note to Rule 50(a)("articulation is necessary . . . so that the responding party may seek to correct any overlooked deficiencies in the proof.").

The Sixth Circuit's authorization of a generalized JMOL motion "predicated on 'all the reasons known to the law'" directly conflicts with these notice requirements. Unless set aside by this Court, the Sixth Circuit's approach has caused unfair prejudice to the Paschals, and will cause prejudice to other litigants confronted with generalized JMOL motions.

For example, the panel grants JMOL on appeal, claiming an absence of "disputed facts" as to Flagstar's summary judgment motion. (App. B at 11a). According to the panel, the district court "found" that Flagstar denied the Paschals' application for a loan in August of 1992, more than three years prior to the September 21, 1995 filing of their complaint. (*Id.* at 12a).

The district court, in denying summary judgment, did not specify any facts it found to "appear without substantial controversy" and "deemed established" for purposes of trial pursuant to F. R. Civ. P. 56(d). The district court, with first hand view of the record, appropriately exercised its discretion in denying summary judgment, and permitting discovery to proceed. *Anderson*, 477 U.S. at 255.

Following the denial of summary judgment, the parties took the depositions of the loan officer and underwriter involved in the Paschals' application. Significantly, by the time of trial, Flagstar no longer claimed the Paschals' application had been denied in August 1992. Rather, its underwriter, Heenan, explained that the Paschals' application

was *not* rejected, but simply closed, after the Paschals declined Flagstar's counteroffer:

> Q. Did the Paschals' file close?
> A. No.
> Q. Was the application withdrawn?
> A. No, it was rejected with a counteroffer.
> . . .
> THE COURT: Well, it wasn't rejected; they did not accept the counteroffer?
> THE WITNESS: They did not accept the counteroffer.
> THE COURT: And therefore the file was closed?
> THE WITNESS: Correct.

This Court is highly sensitive to the Rule 50 notice requirements. In *Weisgram*, this Court noted that "Weisgram was on notice every step of the way that Marley was challenging his experts . . . ." 528 U.S. at 456. The Paschals had no notice at any point in the trial proceedings regarding any alleged statute of limitations defense. The Paschals have been prejudiced by the violations of the Rule 50(b) notice requirements. They have been denied any opportunity to present Heenan's testimony, and other available evidence, to the district court and/or the jury in opposition to Flagstar's limitations defense.

Similarly, the panel critiques the trial testimony of Flagstar's former loan officer, David Reed, regarding Investaid. The panel characterizes Reed's testimony as hearsay, and comments, "the point was not pursued further by the Paschals' attorney." (App. B at 14a).

Again, had the Paschals and their counsel been apprised that Reed's trial testimony would be examined for statute of limitations purposes, the Paschals certainly would have remedied any alleged deficiencies in Reed's testimony, and otherwise target proofs in chronological fashion to show discriminatory acts by Flagstar within the limitations period.

In short, the panel's decision wrongfully denies the Paschals their right to notice and reasonable opportunity to "fill" any alleged "crucial gap in the evidence" as to the timeliness of their claims. *Cone*, 330 U.S. at 217.

II. This Case Warrants Exercise Of This Court's Supervisory Authority.

The court of appeals' unwarranted entry of JMOL on appeal calls for this Court's exercise of its supervisory powers.

This Court's rule, prohibiting entry appellate courts from entering JMOL on appeal where a verdict loser has failed to strictly comply with the procedural requirements of Rule 50(b), is directed to the court of appeals. *Neely*, 386 U.S. at 325. The only means of enforcing an appellate court's compliance with this Court's rule as to entry of JMOL on appeal is for this Court to exercise its supervisory powers over the decision of the court of appeals.

Additionally, the court of appeals' holding that a JMOL motion based on "all the reasons known to the law" is sufficient to preserve any defense reflects a dramatic departure from accepted and usual verdict review standards.

Moreover, this Court has emphasized the rights of litigants, confronted with entry of JMOL on appeal, to seek rehearing in the court of appeals. *Weisgram*, 528 U.S. at 454-55 & n.11. In this case, the Paschals moved for rehearing. The court of appeals, however, refused to consider this Court's precedents requiring strict compliance with Rule 50(b) as to entry of JMOL on appeal.

III. Review Is Necessary To Protect Petitioners' Important Seventh Amendment Rights.

Review is also warranted given the Seventh Amendment concerns underlying the Rule 50(b) requirements.

This Court has upheld the constitutionality of Rule 50. The Seventh Amendment is not violated with respect to the entry of JMOL on the condition that verdict review is conducted in accordance with the requirements of Rule 50. *Weisgram*, 528 U.S. at 449 (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940)). *See Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 658-61 (1935); *Neely*, 386 U.S. at 321.

The entry of JMOL on appeal—in the face of undisputed violations of Rule 50(b)—unlawfully violates the Paschals' Seventh Amendment rights. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1914); *see also Baltimore & Carolina Line*, 295 U.S. at 658-61 (infraction of Seventh Amendment for court of appeals to "itself determine the issues of fact and direct and judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury").

IV. Review Is Warranted To Ensure Uniformity Of Verdict Review Standards.

This case has broad application in terms of Rule 50(b) verdict review standards. In contrast to this Court's insistence on strict compliance with Rule 50(b) requirements, lower courts employ a markedly different standard.

Unlike this Court, lower courts have liberalized compliance with Rule 50(b). *See, e.g., Ebker v. Tan Jay Int'l Ltd.*, 739 F.2d 812, 823 (2d Cir. 1984)(noting "flourishing body of case law" on when post-verdict motion for judgment as a matter of law may be entertained despite failure to make a pre-verdict motion at close of case); *Singer v. Duncan*, 45 F.2d 823, 828-29 (4th Cir. 1995)(citing cases).

Review is warranted to ensure uniformity between this Court's decisions governing Rule 50(b) verdict review standards, and the standards used by the courts of appeals.

V. The Court Of Appeals' Decision Substantially Impairs Prosecution Of Residential Mortgage Lending Discrimination Cases By Private Parties.

Finally, the court of appeals' decision aversely affects the ability of private parties to prosecute lending discrimination cases.

Federal agencies charged with regulating residential mortgage lending have expressed concerns for years with incidents showing race as a factor in lending decisions. *See, e.g.*, Interagency Task Force on Fair Lending, "Policy Statement on Discrimination in Lending", 59 Fed. Reg. 18,267 (Apr. 15, 1994).

As the district court observed below, the parties identified only one previous case in which a plaintiff obtained a successful jury verdict for residential mortgage lending discrimination. *Edwards v. Flagstar Bank, FSB*, Fair Housing - Fair Lending Rptr. (PH) ¶ 16,460, at 16,460.2 (E.D. Mich. 2000), *aff'd in part, rev'd in part on other grounds sub nom. Paschal v. Flagstar Bank, FSB*, 295 F.3d 565 (6th Cir. 2002). This case is believed to be the first successful federal court verdict in a residential lending discrimination context to reach an appellate level.

The absence of successful plaintiff's verdicts is remarkable to say the least, given the millions of applications submitted for residential mortgage loans. Lending data reveal significant differences in loan approval/denial rates among racial groups. *See* Home Mortgage Disclosure Act, 12 U.S.C. §§ 2809-2810 (requiring compilation of aggregate loan approval and denial data by the Federal Financial Examinations Counsel)(available at http://www.ffiec.gov).

Commentators have questioned whether private litigants could prevail in presenting residential mortgage discrimination claims. *See generally Dane, Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. Mich. J.L. Ref. 527, 528 & 568 (1993); *Little, A Citizen's Guide to Attacking Mortgage Discrimination: The Lack of Judicial Relief*, B.C. Third World L.J. 323, 341 (1995); *Swire, The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 Tex. L. Rev. 787, 830-31 (1995).

Unfortunately, the court of appeals' decision renders the almost non-existent private enforcement efforts all the more difficult. For example, the court of appeals views the 16% interest rate term as an action of Investaid, not Flagstar,

and therefore not an instance of discrimination by Flagstar. This argument, if accepted, would improperly insulate from liability mortgage companies and brokers that send minority applicants to "B/C" or "subprime" lenders.

This argument, however, is contrary to the jury's verdict of liability. Both lower courts found Flagstar liable for its own actions, not those of Investaid. Loan applicants have no control as to whether a mortgage company will itself fund a loan on a conventional or portfolio basis, or instead have the loan funded in the subprime or B/C market.

Comparable White applicants with prior bankruptcies closed within the limitations period on their applications with Flagstar under conventional loan terms. Flagstar sent none of these applicants to subprime or B/C lenders. Flagstar's actions, on September 24, 1992, to move the Paschals' file from its own "bank held" 35C program, and send it to a subprime or B/C lender, constituted disparate treatment by Flagstar against the Paschals on racial grounds within the limitations period.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed September 19, 2002]

No. 00-1634/2164

Gerald Paschal, et al.,)
)
Plaintiffs-Appellees,)
v.)
)
Flagstar Bank, FSB,)
a Federal Savings Bank,)
)
Defendant-Appellant.)

Before: SILER and GILMAN, Circuit Judges; HEYBURN, Chief District Judge*

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* The Honorable John G. Heyburn II, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 17, 2002]

No. 00-1634

Gerald Paschal, et al.,	)
	)
Plaintiffs-Appellees,	)
v.	)
	)
Flagstar Bank, FSB, a Federal Savings Bank,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 95-73844
Avern Cohn, District Judge

Before: SILER and GILMAN, Circuit Judges;
HEYBURN, Chief District Judge.*

* The Honorable John G. Heyburn II, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

RONALD LEE GILMAN, Circuit Judge. Eight sets of African-American plaintiffs filed a mortgage-lending discrimination lawsuit against Flagstar Bank. Although the district court granted Flagstar summary judgment against three of these sets, the claims of the other five sets proceeded to trial. During jury selection, Flagstar excused the only African-American on the jury panel. But the district court recalled the juror after concluding that Flagstar's peremptory challenge was improperly exercised. The district court also decided a number of evidentiary issues against Flagstar during the trial. A verdict was subsequently returned in favor of Flagstar as to three of the five sets of plaintiffs, but the jury found that the remaining two sets of plaintiffs--the Edwardses and the Paschals--had proven by a preponderance of the evidence that Flagstar racially discriminated against them when they applied for mortgages. Flagstar filed a number of post-trial motions, all of which were denied by the district court. The bank now appeals the various adverse decisions that the district court rendered throughout the case. For the reasons set forth below, we **AFFIRM** the district court's judgment in favor of the Edwardses, **REVERSE** its judgment in favor of the Paschals, and **REMAND** the case with instructions to dismiss the Paschals' complaint.

I. BACKGROUND

The district court succinctly stated the general background of this case as follows:

> This is a housing discrimination case (mortgage lending) brought under sections 805

> and 818 of the Fair Housing Amendment Act of 1988, 42 U.S.C. § 3605 and § 3617, and corresponding regulations promulgated by the Department of Housing and Urban Development pertaining to mortgage lending, 24 C.F.R. §§ 100.120 to 100.130, as well as the Civil Rights Act of 1866 and 1870, 42 U.S.C. § 1981 and § 1982, and section 504 of Michigan's Elliot-Larsen Civil Rights Act, M.C.L. § 37.2504.
>
> In general, plaintiffs claim that they were the subjects of racial discrimination in the manner in which defendant Flagstar Bank (Flagstar), a mortgage bank, handled their mortgage loan applications or in the way the terms and conditions of their mortgage loans were set.

Edwards v. Flagstar Bank, 109 F. Supp. 2d 691, 692-93 (E.D. Mich. 2000).

Prior to trial, Flagstar filed a motion for summary judgment, arguing that the events underlying the claims of four sets of plaintiffs, including the Paschals, occurred outside of the applicable statute of limitations. Although the district court granted Flagstar's motion for partial summary judgment with regard to the three other sets of plaintiffs, it denied the motion with regard to the Paschals. Flagstar did not contend that the Edwardses' claims were barred by the statute of limitations.

Five sets of plaintiffs went to trial. They are described by the district court as follows:

Audra Carson (Carson) claimed she was the victim of racial discrimination in the manner in which her application for a mortgage loan was handled. She did not close with Flagstar.

Paquita Davis-Friday (Davis-Friday) claimed she was the victim of racial discrimination in the manner in which her application for a mortgage loan was handled. She did not close with Flagstar.

Heath Thomas (Thomas) claimed he was the victim of racial discrimination in the manner in which his application for a mortgage loan was handled. He did not close with Flagstar.

David Edwards and E. Stephanie Edwards, his wife, (the Edwards[es]) claimed they were the victims of racial discrimination in the manner in which their efforts to refinance their mortgage loan with Flagstar was handled. The Edwards[es] eventually obtained a new mortgage loan from Flagstar.

Gerald Paschal and Lisa Paschal (the Paschals) claimed they were the victims of racial discrimination in the manner in which their application for a mortgage loan was handled. The Paschals were approved for a mortgage loan by Flagstar on terms considerably less favorable than for which they applied and eventually obtained a mortgage loan elsewhere.

Edwards, 109 F. Supp. 2d at 693.

Because the jury rendered a verdict in favor of the Edwardses and the Paschals, we will describe their claims in more detail. On March 11, 1994, the Edwardses applied for a 15-year mortgage from Flagstar at a fixed interest rate of 7.875%. Their application was denied on May 26, 1994. According to Flagstar, the Edwardses' application was denied because they had insufficient funds to close the loan, inadequate collateral, and Flagstar "do[es] not grant credit to any applicant on the terms and conditions [the Edwardses] requested." The Edwardses claim that the stated reasons were a pretext designed to mask racial discrimination.

In an attempt to answer Flagstar's questions about various credit issues, the Edwardses met with a Flagstar loan officer on June 1, 1994. The Edwardses maintain that these alleged credit issues were old and inconsequential. Nevertheless, on September 16, 1994, Flagstar issued a second credit denial statement. The Edwardses claim that the reasons given for this denial were also pretextual.

After addressing additional questions about various credit issues, the Edwardses applied for a 30-year mortgage at a higher 9.5% interest rate. When this application was also denied, the Edwardses applied once again for a 30-year mortgage, but this time at a 10.875% interest rate. This final application was approved by Flagstar, and the Edwardses agreed to the terms. The Edwardses now claim that, throughout the entire process, Flagstar treated them as "second class citizens" due to their race.

In contrast, the Paschals were prequalified for a $75,000 mortgage at an adjustable 5.625% interest rate in May of 1992, despite having previously filed for bankruptcy. The Paschals were later notified by a loan officer that their mortgage had been tentatively approved. In August of 1992, however, Flagstar prepared a "Statement of Credit Denial, Termination, or Change" in which it informed the Paschals that Flagstar would approve only a $55,000 mortgage. Flagstar asserted that it was making this "counteroffer" because of the Paschals' other credit obligations, their prior bankruptcy, and the bank's inability to verify the Paschals' credit references. According to the Paschals, these reasons were a pretext intended to hide racial discrimination.

Flagstar's loan officer then took the Paschals' loan file to Mortgage Solutions, a/k/a Investaid Corporation, which preliminarily approved a $75,000 mortgage at a fixed 7.99% interest rate. Investaid, however, later withdrew this offer. According to the Paschals, "Flagstar pressured Investaid to not close on the Paschals' application . . . ." The Paschals also allege that Flagstar fired its loan officer who took the Paschals' file to Investaid. On September 24, 1992, Investaid approved a $59,600 mortgage at 16.490%. After refusing this offer and withdrawing their application from Flagstar, the Paschals received a $68,700 mortgage, at an initial interest rate of 10.490%, from another lender.

The district court summarized the jury trial and subsequent verdicts as follows:

> Plaintiffs' claims were tried to a jury in November of 1999. The jury returned a verdict in favor of Flagstar on the claims of Carson,

> Davis-Friday, and Thomas, and returned a verdict in favor of the Edwards[es] and Paschals. Particularly, the jury found the Paschals proved by a preponderance of the evidence that their race or color was one of the reasons why they did not obtain a mortgage loan from Flagstar. The jury awarded the Paschals $250,000 in compensatory damages and $325,000 in punitive damages. As to the Edwards[es], the jury found that they proved by a preponderance of the evidence that their race and color was one of the reasons why they did not obtain a mortgage loan on their initial application with Flagstar. The jury awarded the Edwards[es] $125,000 in compensatory damages.

Edwards, 109 F. Supp. 2d at 693.

After the jury returned its verdict, Flagstar filed a motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. It also filed alternative motions for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure and for a remittitur. The district court denied all of Flagstar's motions. This timely appeal followed.

II. ANALYSIS

A. Statute of limitations defense

Flagstar contends that the district court erred in denying its motion for summary judgment, which was based

on its argument that the Paschals' suit was barred by the applicable three-year statute of limitations established by 42 U.S.C. §§ 1981 and 1982 and the Michigan Elliott-Larsen Civil Rights Act. M.C.L. § 37.2504. This court has held, however, that "where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed." *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990). The policy behind this rule is based on the conclusion that the potential injustice of allowing the improper denial of a motion for summary judgment is outweighed by the injustice of "depriv[ing] a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." *Id.* at 1016 n.1.

Flagstar acknowledges that the denial of summary judgment is generally not appealable "where summary judgment is denied and the movant subsequently loses after a full trial on the merits." *Id.* at 1016. It claims, however, that the underlying reason for this rule does not apply in this case because "Flagstar's motion was not denied because the trial court found a genuine issue of fact for trial. The trial court instead found that the Paschals' claims *were timely* under the continuing violations doctrine. There was no fact question for the jury to determine." Flagstar contends that the district court's denial of its motion for summary judgment "effectively granted partial summary judgment against Flagstar on its statute of limitations defense."

A district court's determination that a complaint was filed within the applicable statute of limitations is a conclusion

of law. *Tolbert v. State of Ohio Dept. of Trans.*, 172 F.3d 934, 938 (6th Cir. 1999). As noted above, the district court denied Flagstar's motion for summary judgment because it found that the Paschals' "allegations are sufficient to allow the Paschals to invoke the continuing violation doctrine to toll the relevant statute of limitations." Flagstar preserved this issue by moving for judgment as a matter of law at the close of the evidence, predicated on "all the reasons known to the law." The district court denied this motion.

Although Flagstar failed to raise this specific issue when it moved for judgment as a matter of law after the jury rendered its verdict, this court has held that a litigant's failure to raise such a defense in a Rule 50(b) motion does not waive appellate review if an appeal of the denial of a motion of summary judgment on the same ground would involve review of a pure question of law. *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997)(allowing appellate review of a motion for summary judgment on the ground of governmental immunity because, unlike *Jarrett*, the issue before the court was "purely one of law"). Such an exception is applicable in this case because the legal issue raised in Flagstar's motion for summary judgment does not require the resolution of any disputed facts.

Because the district court's decision is properly before us, we must determine whether the "continuing violations" doctrine is applicable to the Paschals' claims. This court has adopted a three-part inquiry for determining whether a continuing violation exists. "First, the defendant's wrongful conduct must continue after the precipitating event that began the pattern . . . . Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the

plaintiffs must have been avoidable if the defendant[] had at any time ceased [its] wrongful conduct." *Tolbert*, 172 F.3d at 940.

The district court found that Flagstar denied the Paschals' application for a loan more than three years before September 21, 1995, the date on which the Paschals filed their complaint. In considering whether the continuing violations doctrine was applicable, however, the district court focused on the Paschals' allegations that: (1) on September 29, 1992, the Paschals had written Flagstar a letter withdrawing their loan application on the grounds of unfair treatment, and (2) on November 4, 1992, Flagstar had granted the Paschals' request to withdraw their application in a "Statement of Credit Denial, Termination or Change." The district court held that "[t]hese allegations are sufficient to allow the Paschals to invoke the continuing violation doctrine to toll the relevant statute of limitations . . . ."

Contrary to the district court's determination, we conclude that neither of these events constitutes a continuing violation. The first occurrence involves a letter the Paschals wrote to Flagstar. Because the passive receipt of a letter does not constitute "wrongful conduct," this event could not possibly satisfy the first prong of the abovementioned three-part inquiry. *Tolbert*, 172 F.3d at 940 (holding that "[p]assive inaction . . . does not support a continuing violation theory"). The second occurrence was the granting of the Paschals' request to withdraw their application for a mortgage. Although this occurrence required action by Flagstar, it does not constitute a separate act of "wrongful conduct." At most, the granting of the Paschals' request was the continuing ill effect of a prior act of discrimination. *Id.*

(noting that "[a] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation") (quotation marks omitted) (alteration in original).

The Paschals cite four other events in support of their claim that the complaint was filed within the applicable statute of limitations. First, the Paschals point out that on September 22, 1992, they "received preliminary approval *from Investaid* for a $75,000 mortgage at a 7.99% interest rate." (Emphasis added.) Second, the Paschals contend that "Flagstar forced Investaid to withdraw its offer to the Paschals." Third, the Paschals allege that, on September 24, 1992, "*Investaid* . . . changed the approval terms to the outrageous 16.490% interest rate . . . ." (Emphasis added.) Fourth, the Paschals claim that they were discriminated against at a meeting on that date, during which a Flagstar loan officer allegedly told them about Investaid's latest loan offer.

Of these four events, the first, third, and fourth cannot possibly constitute a continuing violation. The first and third events clearly involve actions by Investaid, not Flagstar, and thus cannot be considered "wrongful conduct" by Flagstar. As for the fourth occurrence, the act of Flagstar allegedly telling the Paschals about Investaid's latest loan offer would at most be a continual ill effect of past discrimination by Flagstar, not wrongful conduct in and of itself.

The second alleged event--Flagstar "forcing" Investaid to withdraw its original loan offer--is the only one that could be construed to constitute wrongful conduct by Flagstar. Our inspection of the record, however, uncovered no proof to support the Paschals' allegation that Flagstar "forced"

Investaid to withdraw its loan offer. The closest the Paschals come to providing evidence to corroborate their claim is the testimony of a former Flagstar employee, David Reed, Jr. But Reed had no personal knowledge of whether Flagstar tried to exert any influence on Investaid. He simply stated that he "believe[d]" that Flagstar "advised" Investaid to withdraw its loan offer. Moreover, the district court commented that Reed's testimony on this issue was hearsay, and the point was not pursued further by the Paschals' attorney. Rule 56 of the Federal Rules of Civil Procedure, however, requires more than "mere allegations" in support of a claim for a party to survive a motion for summary judgment. Instead, the party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The Paschals have thus failed to provide any specific facts in support of their claim that Flagstar "forced" Investaid to withdraw a loan offer.

In sum, none of these other four events support the Paschals' contention that any wrongful conduct by Flagstar took place within the three years before they filed their complaint. The Paschals' claim is thus barred by the statute of limitations, and the district court erred by denying Flagstar's motion for judgment as a matter of law with respect thereto.

B. Peremptory challenge

Flagstar contends that the district court committed reversible error when it recalled an African-American juror whom Flagstar had removed through the use of a peremptory challenge. Specifically, Flagstar maintains that, after it articulated a race-neutral reason for challenging the juror, the district court improperly combined the second and third steps of the Batson test and erroneously placed the burden on

Flagstar to establish that the peremptory challenge was not racially motivated. *Batson v. Kentucky*, 476 U.S. 79 (1986).

"In determining whether a party has committed a *Batson* violation in its exercise of a peremptory challenge, a district court must follow a three-step process." *United States v. Mahan*, 190 F.3d 416, 424 (6th Cir. 1999). The district court must first determine whether "the opponent of a peremptory challenge has made out a prima facie case of racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Next, if the opponent of the peremptory challenge makes out a prima facie case, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation." *Id.* "[I]f a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination." *Mahan*, 190 F.3d at 424. At the third step of the analysis, "the district court has the responsibility to assess the [strike proponent's] credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the [strike opponent's] prima facie case under the totality of circumstances." *Id.* at 425 (citation omitted).

"The district court's ruling on the ultimate question of discriminatory intent in the exercise of peremptory challenges is a finding of fact." *Id.* at 423. Although Flagstar acknowledges that this court generally reviews a district court's application of the *Batson* test for "clear error," it claims that the district court committed an error of law in applying the test and, therefore, we should review the court's determination de novo. In support of this argument, Flagstar cites *United States v. McFerron*, 163 F.3d 952, 955 (6th Cir.

1998) (holding that the district court erred "by consolidating the second and third steps of the *Batson* analysis and imposing the burden of persuasion on [the proponent of the strike]").

Jury selection in this case began with 17 prospective jurors. Only one of these prospective jurors, Juror # 2, was African-American. During voir dire, Juror # 2 disclosed that she worked for the Michigan State Housing Development Authority (MSHDA). The district court asked her what type of work she did for the MSHDA. Juror # 2 explained that she was "the calculations clerk" and that she "process[ed] payments for low-income housing people" who receive Section 8 housing benefits. Flagstar did not request the district court to ask Juror # 2 any additional questions about the type of work that she did. After the district court eliminated several other jurors, both parties passed the jury for cause.

Flagstar then attempted to use one of its peremptory challenges to excuse Juror # 2. At a sidebar conference with the judge, the plaintiffs objected and pointed out that Juror # 2 was the only African-American juror on the panel. The following exchanges then took place at the side-bar:

> The Court: Why did you excuse [uror #2]?
>
> Mr. White: Your Honor, besides just using my peremptory, Your Honor, I believe her employment with MSHDA may give her some sort of information regarding this case because I believe Flagstar at some point in time - -
>
> The Court: You should have challenged her for cause.

. . .

Mr. White: Why would I have to have a reason on a peremptory?

The Court: There's a case, *Batson*, that gives you the right not to excuse them for discriminatory purposes, and you couldn't give me an answer.

Mr. Phifer: Other than - -

The Court: You asked her no questions. That was a reason for cause. I find that the reason you have excused her is because of her race and it's an impermissible ground.

. . .

The Court: I don't want to look back. I'm accepting your representation. You had your opportunity during voir dire to inquire into what she did. She's a functionary at MSHDA. She collects payments from low-income people. You did not ask me to ask any follow-up questions. I believe that the *Batson* rule which prohibits discrimination in jury selection applies equally in civil cases as to criminal cases, and I find, based upon what you have told me, that you chose to challenge this juror, excuse her peremptorily because she is an African-American.

. . .

> Mr. White: You wouldn't have excused the Black lady for cause for what I said, Your Honor.
>
> The Court: . . . The woman from MSHDA is the only African-American on this panel, and you have not given me a legitimate reason for exercising a peremptory challenge. The sole basis of your challenge is her employment, and you asked no questions about her employment during the course of the voir dire. Therefore, I draw the inference and make the finding.

Flagstar does not contest the district court's conclusion that the plaintiffs made out a prima facie case of racial discrimination. Instead, Flagstar focuses its challenge on the second and third steps of the *Batson* test. Flagstar contends that the district court erred by combining the second and third steps, thereby placing the burden on Flagstar to prove that its peremptory strike was not racially motivated.

Under the second step of the *Batson* test, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation." *Purkett*, 514 U.S. at 767. When the district court asked Flagstar why it exercised a peremptory challenge on Juror # 2, Flagstar stated that it "believ[ed] her employment with MSHDA may give her some sort of information regarding this case . . . ." Flagstar contends that the district court "summarily dismissed" this race-neutral explanation for the peremptory strike. Its contention is not supported by the record. Although the district court was not wholly satisfied with Flagstar's response, the court clearly stated that it was "accepting

[Flagstar's] representation" as to the bank's race-neutral reason for the peremptory strike.

The district court, after accepting Flagstar's race-neutral explanation, then moved on to the final step of the *Batson* test. At the third step of the analysis, "the district court has the responsibility to assess the [strike proponent's] credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the [strike opponent's] prima facie case under the totality of circumstances." *Mahan*, 190 F.3d at 425 (citation omitted). The district court articulated several reasons why, under the totality of the circumstances, it believed that the strength of the plaintiffs' prima facie case outweighed the credibility of Flagstar's asserted justification. According to the record, the district court primarily relied on the fact that Flagstar did not ask Juror # 2 any questions about her employment despite its purported concern about what she might have known of Flagstar through her employment at the MSHDA. The district court also pointed out that, based on the court's questioning of Juror # 2 during voir dire about her specific job duties, there was no reason to believe that she had any contact whatsoever with Flagstar.

Although the district court's application of the *Batson* test was less than ideal, in that the court prematurely stated its conclusion before fully articulating the *Batson* analysis, the district court did not commit an error of law in applying the test. We should refrain from overturning the district court's decision on this issue unless it clearly erred in concluding that Flagstar acted with discriminatory intent in excusing Juror #2. *Mahan*, 190 F.3d at 423. The district court was in a much better position than we are to determine the credibility of

Flagstar's attorneys. After reviewing the record, we are not "left with the definite and firm conviction" that the district court erred in concluding that Flagstar exhibited discriminatory intent in peremptorily striking the sole African-American juror. We therefore hold that the district court did not commit reversible error when it recalled Juror # 2.

C. Evidentiary rulings

Flagstar contends that the district court erred in: (1) allowing into evidence testing conducted by the Fair Housing Center of Metropolitan Detroit (FHC), which Flagstar argued had extremely low, if any, probative value, and a substantial prejudicial effect; (2) preventing Flagstar from offering into evidence "four loan files of minority applicants who were extended mortgages despite deficiencies in their credit applications or credit histories"; and (3) preventing Flagstar from offering into evidence Community Reinvestment Act performance evaluations conducted by the Office of Thrift Supervision. It maintains that the plaintiffs' testing evidence should have been excluded, while its own evidence should have been admitted, all pursuant to Rules 401, 402, and 403 of the Federal Rules of Evidence.

We will not disturb a district court's evidentiary rulings unless we find an abuse of discretion. *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir. 1999). "In reviewing the trial court's decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *United States v. Schrock*, 855

F.2d 327, 333 (6th Cir. 1988)(quotation marks omitted). An abuse of discretion occurs when we are left with the "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors" or "where [the trial court] improperly applies the law or uses an erroneous legal standard." *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000) (citations and internal quotation marks omitted).

Under Rule 402, "[e]vidence which is not relevant is not admissible." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even relevant evidence, however, may be properly excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

1. Testing evidence

Flagstar contends that the testing evidence should have been excluded pursuant to Rule 402 because it "had no probative value on the issue of whether Flagstar discriminated against the plaintiffs in the consideration of their mortgage applications." In the alternative, Flagstar argues that the testing evidence should have been excluded under Rule 403 because it focused on the racially inflammatory conduct of Chet Allen, a Flagstar loan officer who was not involved in the processing of the plaintiffs' applications, and, therefore,

the low probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Although the FHC sent ten pairs of testers to Flagstar between July 16, 1994 and March 2, 1995, the plaintiffs offered the results of only three matched-pair tests into evidence. The pairs of testers were named as follows: (1) Selman/Taylor, (2) Jordan/Kisch, and (3) Cox/Chapp. In each case, the first name listed is that of an African-American tester and the second name listed is that of a Caucasian tester. Although the district court preliminarily decided to admit into evidence the results of all three pairs of testers, it later excluded a portion of the evidence related to the Cox/Chapp test as substantially more prejudicial than probative.

Clifford Schrupp, the Director of the FHC, gave background information regarding the testing conducted by the three pairs of testers. During his direct testimony, Schrupp stated that the FHC decided to perform the testing after receiving several complaints, including one from the Paschals, about Flagstar. Schrupp noted that the FHC "incorporated some of the elements of the various complaints that we had, in particular the Paschals, into the assignments that we then gave to the testers." He also explained why the testers, unlike the plaintiffs, did not fill out loan applications:

> Q. And in terms of the mortgage testers, do the testers fill out loan applications?
>
> A. No, they do not.
>
> Q. In a rental test do the testers fill out applications for a rental?

A. It's not a routine or normal thing for testers to do, but there have been instances where that has happened.

Q. How come - - can you explain why applications are not submitted when you do testing of financial institutions?

A. An application normally for a financial institution runs 300, 350 dollars, sometimes more. [The FHC is] not funded to be able to put those kinds of investments into, into filling out the application.

We also found - - we began doing tests of financial institutions in 1984 under a contract that we had with the City of Pontiac, and we found out in that series of tests that we did in 1984 of financial institutions in Pontiac that we could get quite a bit of information about how people are treated and may be treated differently by loan officers before we get to the point of having to fill out a loan application. And so we were satisfied that we could identify quite a bit of information about how somebody is being treated in that early stage, and so for those two reasons we haven't done loan applications or paid - - asked our testers to fill out loan applications themselves.

Schrupp testified that the three pairs of testers experienced differences in treatment that were potentially

attributable to racial discrimination. First, although Selman and Taylor presented similar financial qualifications and each told the Flagstar loan officer that they wanted a house in the Detroit area, they were directed to different neighborhoods. The loan officer suggested that Selman, the African-American tester, should look for a home in a neighborhood, Rosedale Park, that is approximately 75 percent African-American. Taylor, the Caucasian tester, was directed to a neighborhood that is approximately 70 percent Caucasian. Furthermore, the loan officer gave the African-American tester the name of an African-American real estate agent and the Caucasian tester the name of a Caucasian real estate agent.

Second, Jordan and Kisch presented similar financial qualifications, and each told the Flagstar loan officer that they wanted a house in Ann Arbor, a predominantly Caucasian community. The loan officer, however, encouraged Jordan, the African-American tester, to consider instead Ypsilanti, which has approximately a 50 percent African-American population. No such suggestion was made to the Caucasian tester.

Finally, Cox and Chapp attempted to set up appointments to meet with Chet Allen, the loan officer who was involved in the Selman/Taylor testing. Cox, the African-American tester, visited Flagstar and asked the receptionist if he could meet with Allen. Because Allen was not in, the receptionist asked Cox to leave his name and phone number. Allen called Cox later that day and indicated that he could prequalify Cox for a loan over the phone. When Chapp, the Caucasian tester contacted Allen, Allen suggested that he should set up an appointment for a meeting to get more

information about a loan. Schrupp testified that the different treatment suggested the possibility of racial bias.

Despite Flagstar's claim to the contrary, we do not believe that the district court abused its discretion in finding that the testing evidence was relevant. The plaintiffs have pointed out that the testers were given some of the same financial attributes that the plaintiffs presented to Flagstar. For example, the Jordan/Kisch test involved a Caucasian tester who, like Thomas, worked for a temporary employment agency. The Selman/Taylor and the Jordan/Kisch tests also involved Caucasian testers who, like the Paschals, had a history of bankruptcy. Overall, their experiences suggest that Flagstar might treat African-American and Caucasian customers differently, at least during the preapplication stage.

As Flagstar points out, however, Schrupp admitted that the testing was "inconclusive" on the question of whether Flagstar was less likely to grant a mortgage to an African-American than it was to grant a mortgage to a Caucasian. The fact that this evidence is inconclusive as to the resolution of the ultimate question involved in this trial does not, however, mean that it is irrelevant. If, for instance, the results of the testing had shown that the testing uncovered no evidence of discriminatory treatment in the preapplication stage, Flagstar would likely be arguing that the evidence was relevant to the question of whether it had discriminated against the plaintiffs. The testing evidence, though not strong, possesses a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. We therefore find no abuse of

discretion in the district court's determination that the testing evidence was relevant.

This brings us to the question of whether the district court abused its discretion by failing to exclude the testing evidence under Rule 403. Flagstar contends that the testing evidence should have been excluded because it focused on the potentially inflammatory conduct of Chet Allen, a Flagstar loan officer who was not involved in processing the plaintiffs' mortgage applications. The bank therefore maintains that the low probative value of the testing evidence was substantially outweighed by the danger of unfair prejudice. But "[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) (citation and internal quotation marks omitted).

Flagstar argues that the testimony regarding Chet Allen was unfairly prejudicial because it tended to suggest a decision against the bank based on the fact that it employed someone who allegedly had racist views. During Schrupp's testimony regarding the Cox/Chapp test, the following evidence was heard by the jury:

> Q. Was there anything in the narrative section, Page 2035 through 2039, that raised concerns when you reviewed the testing?
>
> A. There were several things in the narrative section, yes.

Q. And what were those concerns that you had?

A. Well, in the narrative section, Page 2035 near the bottom of the page, there is a discussion reported by Mr. Chapp that he had told [loan officer Chet Allen] that he was looking [for a house] in Farmington. He had been asked by the loan officer where he was looking for housing. He said Farmington, but the prices were too high for him in Farmington. He had previously indicated that he was staying with his son in Southfield, and apparently at that point the loan officer said you don't want Southfield or east Dearborn, [there are] too many Arabs. Instead he suggested Royal Oak, Pleasant Ridge, Huntington Woods.

. . .

Q. I believe you can continue on 2036, the second page of the narrative test form. Just very, very briefly were there any other items that raised concerns? You don't have to read it, but just hit the highlights of it.

A. There was a reference to east English Village again, the area where the loan officer lived. He indicated to the tester that it was a nice area, but he would not want his son to go to school there but instead recommended that

his son go to schools in the Grosse Pointe area.

Q. And I take it there were other statements made?

A. Yeah, there were other references in the report form to the Dearborn area and to the fact that Arabs live in Dearborn and other positive references to other communities and in fact references to several real estate agents who might be of assistance to Mr. Chapp.

Q. Now, are you familiar with the racial composition or approximate racial composition of the various communities identified by the loan officer?

A. Generally, yes.

At a side bar conference, the district court described the problem with this line of questioning: "You've now got a situation where you've got, in the most extreme terms, a racist loan officer. Well, you can't extrapolate from a racist loan officer institutional racism on the part of the institution. You can't do that. That's not probative of an institutional animus." To the extent that such testimony suggested to the jury an improper basis for its verdict, the evidence was unfairly prejudicial.

The question under Rule 403, however, is not simply whether the evidence was unfairly prejudicial. Instead, the

testing evidence was subject to exclusion only if its probative value was "substantially outweighed by the danger of unfair prejudice." Although admittedly a close question, we are not left with the "definite and firm conviction that the trial court . . . committed a clear error of judgment" in concluding that the probative value of the testing evidence was not substantially outweighed by the danger of unfair prejudice. This is particularly true in light of the fact that "[i]n reviewing the trial court's decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *United States v. Schrock*, 855 F.2d 327, 333 (6th Cir. 1988) (quotation marks omitted).

Our conclusion is buttressed by the fact that the district court did exclude two of the exhibits related to the potentially inflammatory Cox/Chapp test. One of these exhibits included test report forms filled out by Chapp and Ratkowski, another Caucasian tester who posed as Chapp's wife, relating to a fair-lending test that they conducted on March 2, 1995. This exhibit described racist statements allegedly made by Chet Allen during the test. The other exhibit was the transcript of a recording that Chapp and Ratkowski made of the same fair-lending test. These exhibits were excluded by the district court because it found that the danger of unfair prejudice substantially outweighed whatever probative value the exhibits might have. This decision demonstrates that the district court was cognizant of the potentially prejudicial impact of the testimony and that it attempted to draw the appropriate balance under Rule 403. The district court's exclusion of the evidence of testing conducted on Flagstar's lending practices

in Grand Rapids, Michigan further points out that it was aware of potential limitations on the probative value of testing evidence.

In addition, the evidence regarding Allen was most explicit regarding his animus against Arab-Americans, whereas this case involved alleged discrimination against African-Americans. We also note that testing evidence in the context of rental discrimination has long been held admissible under Rule 403 despite the fact that it has some of the same potential limitations on its probative value as in the lending context. *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983). Finally, we note that the jury returned a verdict in favor of Flagstar as to the claims regarding three of the five sets of plaintiffs. If the unfairly prejudicial effect of the testing evidence had been substantial, the jury would have likely found against Flagstar on all the claims. We will therefore not reverse the district court's judgment or grant Flagstar a new trial on this basis.

2. *Four loan files*

Flagstar next contends that the district court erred in preventing it from offering into evidence "four loan files of minority applicants who were extended mortgages despite deficiencies in their applications or credit histories." In excluding this evidence, the district court stated:

> There will be no comparable use - - there will be no African-American comparable to an African-American file. It is not arguably relevant to any of the issues in this case.

> Given [] the files available to [Flagstar] because of the large number of mortgages it generates, the fact that it [granted a mortgage to] an African-American wh[o] it says [is] comparable to . . . one of the [] African-American plaintiffs[,] doesn't mean that [Flagstar] didn't discriminate against the [plaintiffs].

The plaintiffs claim that Flagstar waived this issue by failing to make an offer of proof regarding the excluded files. *Selden Apartments v. HUD*, 785 F.2d 152, 162 n.13 (6th Cir. 1986)(noting that Rule 103(a)(2) of the Federal Rules of Evidence requires a party to make known to the court the substance of the excluded evidence in order to preserve the issue for appeal). Flagstar has not responded to this argument, an argument that we find persuasive. In any event, even if the district court should have accepted the four files into evidence, we would have been hard-pressed to conclude that, by not doing so, it "committed a clear error of judgment." *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000).

3. CRA performance evaluations

Finally, Flagstar contends that the district court erred in excluding Flagstar's proposed Exhibits 331, 332, and 341. These exhibits consisted of Community Reinvestment Act (CRA) performance evaluations by the Office of Thrift Supervision (OTS), the federal regulatory agency charged with supervising Flagstar. The purpose of the CRA is "to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of

the local communities in which they are chartered consistent with the safe and sound operation of such institutions." 12 U.S.C. § 2901(b). In excluding evidence of performance evaluations performed by the OTS to determine whether Flagstar was complying with the CRA, the district court stated: "I finding nothing arguably relevant to any of the issues in this case. What [the performance evaluations] show is overall Flagstar had a relatively good compliance program. It has nothing to do with the issues in this case."

The plaintiffs have pointed out that Flagstar did not respond to the plaintiffs' motion in limine to prohibit introduction of the CRA performance evaluations. This again constitutes a waiver of this argument on appeal. *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1299 (6th Cir. 1992) ("It is well settled law that this court will not consider an error or issue which could have been raised below but was not."). Moreover, after reviewing the record, we would not likely have found the district court's exclusion of the CRA performance evaluations to be reversible error. *Huey*, 230 F.3d at 228.

D. Motion for judgment as a matter of law

Flagstar contends that the district court erred in denying its motion for judgment as a matter of law, which it filed following the jury's verdict. Specifically, Flagstar argues that the evidence at trial was insufficient to support the jury's finding of racial discrimination and, therefore, that Flagstar is entitled to judgment in its favor as a matter of law.

A motion for judgment as a matter of law "may not be granted unless reasonable minds could not differ as to the

conclusions to be drawn from the evidence." *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 486 (6th Cir. 1989). An appeals court is not to "weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury." *Toth v. Yoder Co.*, 749 F.2d 1190, 1194 (6th Cir. 1984). Instead, we must view the evidence in the light most favorable to the opposing party, drawing all reasonable inferences in that party's favor. *Id.*

The district court concluded that "[t]here is no basis for a judgment as a matter of law in favor of Flagstar," because viewing "[t]he evidence in a light most favorable to the Paschals and Edwards[es] supports the jury's verdict that both parties proved by a preponderance of the evidence that race was a factor in the way in which Flagstar dealt with each of them." *Edwards*, 109 F. Supp. 2d at 704. According to the district court, the following evidence was particularly central to its decision: (1) "[Calvin] Bradford's conclusions that the only variable in [the plaintiffs'] treatment by Flagstar compared to white applicants was that they were treated less favorably because of their race," (2) "the [Home Mortgage Disclosure Data (HMDA)] data which generally proved that Flagstar acted with a discriminatory animus," and (3) "the testing data which displayed a discriminatory animus." *Id.*

The testing data has been discussed at length in Part II.C.1. above. We now will describe briefly the testimony of two of the plaintiffs' expert witnesses, Calvin Bradford, Ph.D., and Martin Wing, Ph.D. Bradford testified for the plaintiffs as a mortgage-lending discrimination expert. After examining the documents pertaining to the plaintiffs' applications for mortgages from Flagstar, Bradford also checked the files of various Caucasian applicants whose

mortgage applications were approved by the bank. Although Bradford acknowledged that no two loan applications are ever exact matches, he compared the plaintiffs' applications with those of Caucasian applicants who had similar financial qualifications. Bradford first compared the Paschals' file with those of six Caucasian applicants. He concluded that the differences in how Flagstar treated the Paschals could not be explained by any valid underwriting criterion. Bradford then compared the Edwardses' file with those of two Caucasian applicants. Again, Bradford concluded that the differences in how Flagstar treated the Edwardses could not be explained by any valid underwriting criterion.

Wing testified for the plaintiffs as an expert in econometrics. The plaintiffs asked Wing to determine "if there was any evidence of differences in treatment between African-American applicants and White applicants for home mortgage loans at Flagstar Bank." Wing provided a detailed statistical analysis of Flagstar's lending practices based on Home Mortgage Disclosure Data (HMDA) for 1988 through 1996 that Flagstar had provided to the Federal Financial Institutions Examination Council. According to Wing, HMDA data "consists of a set of variables that financial institutions must record for all loan applications, for all home mortgage loan applications." Wing testified that between 1988 and 1996, Flagstar denied African-American applicants three times more often than it denied Caucasian applicants. Based on his statistical analysis of the HMDA data, Wing concluded that "the denial rates depend on race. The denial rate and race are dependent, not independent." In other words, Wing concluded that the disparity between the rate at which Flagstar denied applications of African-Americans and the rate at

which it denied applications of Caucasians could not be fully explained by other factors such as income or credit history.

Flagstar claims that the evidence offered by the plaintiffs was insufficient to support the jury's finding of racial discrimination. First, Flagstar points out that the testimony of the Paschals and Edwardses about alleged discrimination was completely circumstantial. It notes that even the district court characterized this evidence as being "rather weak." Second, Flagstar claims that the testing evidence lacked probative value because, as Schrupp admitted, the tests were inconclusive as to whether Flagstar was less likely to grant a mortgage to an African-American, than it was to grant a mortgage to a Caucasian. Flagstar also emphasizes that the testing evidence involved Flagstar's treatment of individuals during the preapplication process as opposed to during the underwriting process. Third, Flagstar contends that the statistical evidence presented by Wing was of limited reliability because he omitted several key variables and he aggregated data across different loan programs with different underwriting standards. Fourth, Flagstar claims that the files on which Bradford based his comparisons involved applications that were governed by different underwriting standards. As a result, Flagstar claims that Bradford's testimony "could not have convinced a reasonable juror that Flagstar discriminated against [the plaintiffs]."

Contrary to Flagstar's arguments, we are of the opinion that there was sufficient evidence to support the jury's finding of racial discrimination. First, the Edwardses and the Paschals both experienced numerous, seemingly unnecessary delays in applying for loans. According to Bradford, none of the Caucasian applicants whose files he compared with the

plaintiffs' experienced such a multitude of "tactics of delay" and "hindrance." Second, although the testing focused on preapplication contacts with Flagstar, it is not unreasonable to draw the inference that the disparate treatment encountered by African-American testers during their initial interactions with Flagstar might be indicative of what applicants for mortgages would experience. Schrupp, who has been the executive director of the FHC for 22 years, testified that it has been his experience that this sort of testing can provide "quite a bit of information about how people are treated and may be treated differently by loan officers." Third, the methodological concerns that Flagstar raises regarding Wing's testimony are generally insubstantial. As the Supreme Court has held, "it is clear that a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (Brennan, J., concurring) (internal quotation marks omitted). Wing's finding that, between 1988 and 1996, Flagstar denied African-American loan applicants three times more often than Caucasian applicants provides support for the jury's verdict. Finally, the district court found that the expert testimony provided by Bradford was compelling. The district court stated that "Mr. [Bradford] was one of the best-prepared experts that I have heard in 20 years." Later, the district court noted that, "[y]ou know, without hearing the cross-examination, Bradford painted a pretty bleak picture for [Flagstar]."

Flagstar is correct that, when broken down into discrete parts, the plaintiffs' evidence might be subject to attack. For example, Steven Laidlaw, who manages Flagstar's disclosures under the Home Mortgage Disclosure Act, testified that Flagstar approved mortgage applications at the

following rates: 89.1% for African-Americans, 96% for Caucasians in 1994; 92.8% for African-Americans, 97% for Caucasians in 1995; and 91.3% for African-Americans, 96.5% for Caucasians in 1996. These approval rates do not, however, tell us anything about whether the mortgage applications that were approved discriminated in their terms and conditions on the basis of race.

Given the combined effect of the testimony offered by the plaintiffs, we are of the opinion that there was sufficient evidence for reasonable minds to "differ as to the conclusions to be drawn from the evidence." *McJunkin Corp.*, 888 F.2d at 486. Accordingly, we conclude that the district court did not err in holding that the evidence "supports the jury's verdict that both [plaintiffs] proved by a preponderance of the evidence that race was a factor in the way in which Flagstar dealt with each of them."

E. Motion for a new trial

In the alternative, Flagstar contends that the district court erred in denying its motion for a new trial. Flagstar maintains that it is entitled to a new trial because the evidence was insufficient as to both liability and damages. It raises the same arguments in support of this claim as it did in support of its claim that the district court erred in denying its motion for judgment as a matter of law.

A district court's decision to deny a motion for a new trial will not be set aside unless the court abuses its discretion. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). Such an abuse will be found only if we have "a definite

and firm conviction that the trial court committed a clear error of judgment." *Id.*

In evaluating Flagstar's motion for a new trial, the district court concluded that, "viewing the evidence in a light most favorable to the Paschals and Edwards[es], the Court has no firm conviction that there is an injustice in the liability verdict or that it is a mistake to allow the liability verdict to stand." *Edwards*, 109 F. Supp. 2d at 704. The district court noted that "[t]he sequence of events, the length of time, the comparable data, the HMDA data, the testing data, all support the conclusion that the verdict was certainly one which a jury could reasonably have come to as to liability." *Id.* Based on an analysis of a number of comparable cases in which damages were awarded for discrimination, the district court also concluded that "the compensatory damages awarded by the jury are not excessive or out of line with awards in similar cases." *Id.* at 705.

As explained above, the plaintiffs' evidence, when considered as a whole, provides sufficient support for the jury's verdict. We therefore conclude that the district court did not abuse its discretion when it denied Flagstar's motion for a new trial.

F. Punitive damages

Flagstar's final contention is that the evidence does not support the jury's award of $325,000 in punitive damages to the Paschals. Because we have concluded that the Paschals' claim is barred by the statute of limitations (*see* Part II.A. above), this issue is moot.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the district court's judgment in favor of the Edwardses, **REVERSE** its judgment in favor of the Paschals, and **REMAND** the case with instructions to dismiss the Paschals' complaint.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 17, 2002]

No. 00-2164

Gerald Paschal, et al.,	)
	)
Plaintiffs-Appellees,	)
v.	)
	)
Flagstar Bank, FSB, a Federal Savings Bank,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 95-73844
Avern Cohn, District Judge

Before: SILER and GILMAN, Circuit Judges; HEYBURN, Chief District Judge.†

† The Honorable John G. Heyburn, II, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

RONALD LEE GILMAN, Circuit Judge. Eight sets of African-American plaintiffs filed a mortgage-lending discrimination lawsuit against Flagstar Bank. Although the district court granted Flagstar summary judgment against three of these sets, the claims of the other five sets proceeded to trial. A jury verdict was ultimately returned in favor of two sets of plaintiffs. These plaintiffs then filed a motion for attorney fees, expert witness fees, costs, and interest. The district court awarded a total of $455,128.80, plus post-judgment interest, for these items. Flagstar objects to several components of this total award. For the reasons set forth below, we **AFFIRM** the district court's calculations of these various items, but **VACATE** the award and **REMAND** the case for the court to reduce the attorney fees and interest to account for the fact that only the Edwardses have ultimately prevailed in this litigation, and to consider whether this fact will affect its award of expert witness fees and miscellaneous costs.

I. BACKGROUND

The jury found that two sets of the plaintiffs, the Edwardses and the Paschals, had proved by a preponderance of the evidence that Flagstar racially discriminated against them when they applied for mortgages. A verdict of $125,000 in compensatory damages was awarded to the Edwardses, and $250,000 in compensatory damages and $325,000 in punitive damages was awarded to the Paschals.

After the verdict was entered, these plaintiffs filed a motion for attorney fees, expert witness fees, costs, and

interest. Their motion requested: (1) $160,766.80 in attorney fees; (2) $87,538 in expert witness fees and costs (consisting of (a) $50,514.35 for Martin Wing, Ph.D., who testified as an expert in econometrics and provided a statistical analysis of Flagstar's lending practices, (b) $23,569.12 for Calvin Bradford, Ph.D., who testified as a mortgage underwriting expert, (c) $1,350 for George Galster, Ph.D., a fair-lending testing expert who was prepared to rebut Flagstar's expert witness, and (d) $12,104.53 in miscellaneous costs); (3) interest; and (4) "such other and additional relief that the Court deems just and appropriate." As the district court noted, this final request is the traditional way in which an attorney-fee enhancement is requested. The district court granted the plaintiffs' requests, including a $80,000 attorney-fee enhancement. This timely appeal followed, with Flagstar challenging all the components of plaintiffs' request other than the award of interest.

II. ANALYSIS

A. Standard of review

This court will not disturb a district court's determination regarding the award of attorney fees and costs unless it concludes that the lower court has abused its discretion. *Perotti v. Seiter*, 935 F.2d 761, 763 (6th Cir. 1991). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989) (citation omitted). "An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly

erroneous findings of fact." *First Tech. Safety Sys. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993).

B. Attorney fees

Flagstar claims that the district court abused its discretion in failing to review the complete billing records of the plaintiffs' counsel in order to determine whether the requested fee improperly included payment for hours that the attorneys spent working on the claims of the losing plaintiffs. As the district court noted, however, Flagstar "does not directly take issue with the hours detailed by [the plaintiffs' attorneys] or their hourly rates. Rather, [Flagstar] says that insufficient detail has been furnished in support of the hours of work."

The primary concern in evaluating a request for attorney fees "is that the fee awarded be reasonable." *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999). "A reasonable fee is one that is adequate to attract competent counsel, but . . . [does] not produce windfalls to attorneys." *Id.* (internal quotation marks omitted) (alteration in original). In determining a reasonable attorney-fee award, the district court must calculate "the lodestar amount by multiplying the reasonable number of hours billed by a reasonable billing rate." *Id.* As noted above, this court will not overturn an attorney-fee award unless we conclude that the district court abused its discretion.

The district court found that the billing statements and affidavits of the plaintiffs' attorneys "adequately support the hours claimed." As part of their request for attorney fees, the plaintiffs submitted 36 pages of descriptive billing entries for

Attorney Tomkowiak and 2 pages of descriptive entries for Attorney Stanton. Each of the entries in these billing statements includes a detailed description of how the attorney spent the hours that he billed. Some descriptions include as many as ten lines of small-font text. The plaintiffs submitted the affidavits of three Detroit lawyers who have experience litigating housing-discrimination cases to confirm that a $185 hourly rate for Attorney Tomkowiak and a $150 hourly rate for Attorney Stanton were reasonable. As noted above, Flagstar did not challenge the reasonableness of the requested hourly rates.

In his affidavit, Attorney Tomkowiak confirms that the billing statements only include "attorneys fees and costs incurred on behalf of [the Paschals and the Edwardses] . . . ." He specifically declares that "[t]ime entries and costs pertaining solely to the claims of other Plaintiffs and former Plaintiffs . . . have been excluded from the itemized entries for attorneys fees and costs." Flagstar has failed to point to any specific entries which would cause it to doubt the veracity of Attorney Tomkowiak's sworn statement. After reviewing the entries ourselves, we find no reason to doubt the accuracy of the billing statements or the reasonableness of the number of hours billed. We therefore conclude that the district court did not abuse its discretion in awarding the plaintiffs $160,766.80 in attorney fees. Because, however, we have reversed the district court's denial of Flagstar's motion for judgment as a matter of law with respect to the Paschals' claim, the attorney fees will have to be recalculated on remand.

C. Attorney-fee enhancement

Flagstar claims that the district court abused its discretion in granting the plaintiffs an attorney-fee enhancement of $80,000. In particular, Flagstar contends that two of the district court's reasons for granting an enhancement--the "arduous and time consuming nature" of the litigation and the fact that the plaintiffs' attorneys did "an excellent job at trial"--are improper under Supreme Court precedent. Flagstar also disputes the district court's conclusion that the hourly rates used to calculate the "lodestar" award were "modest."

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), the Fifth Circuit enunciated 12 factors that trial courts may consider in calculating reasonable attorney-fee awards. The Supreme Court has determined that "*Johnson*'s 'list of 12' . . . provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees . . . ." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). These 12 factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the

> attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 91 n.5.

This court has held that a trial court may apply the *Johnson* factors during its initial calculation of the attorney-fee award or when the court is considering a request for an enhancement. *United Slate, Tile & Composition Roofers v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 502-03, 503 n.3 (6th Cir. 1984) (stating that the trial court should first conduct the initial evaluation, then examine the award against several factors, including the Johnson factors, but also noting that trial courts usually subsume the analysis of those factors within the initial calculation). The district court should also "provide a concise but clear explanation of its reasons" for its conclusions regarding an attorney-fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

In support of their request, the plaintiffs emphasized that the following factors justify an attorney-fee enhancement under *Johnson*: (1) this was a relatively novel and difficult case, (2) the issues were complex, and (3) their attorneys incurred a significant risk in undertaking the representation. The district court began its analysis by correctly noting that the plaintiffs' third reason, the contingency risk involved in this case, is not a valid ground for enhancement under federal fee-shifting statutes. *Burlington v. Dague*, 505 U.S. 557, 567 (1992). Nevertheless, the district court did conclude that there were several other valid reasons for granting the plaintiffs an

attorney-fee enhancement. It stated that an enhancement was warranted for the following reasons:

> Tomkowiak and Stanton did an excellent job at trial in proving to the jury the merits of the Edwards[es]' and Paschals' claims of discriminatory treatment in an area (residential mortgage lending) where discriminatory treatment is often difficult to prove. The marshaling of evidence was an arduous and time consuming task. Moreover, the hourly rates on which the "lodestar" amount is computed are comparatively modest in light of prevailing rates in this area, and not out of line with those awarded in similar cases.

For these reasons, the district court granted the plaintiffs a 50% increase to the "lodestar," resulting in a total attorney-fee award of $240,766.80.

As we understand the district court's explanation, its decision to enhance the attorney-fee award rests on the following four grounds: (1) the attorneys "did an excellent job at trial," (2) this case involved "claims of discriminatory treatment in an area (residential mortgage lending) where discriminatory treatment is often difficult to prove," (3) "[t]he marshaling of evidence was an arduous and time consuming task," and (4) the hourly rates used to calculate the lodestar are relatively modest. Contrary to Flagstar's assertions, we are unable to conclude that the district court abused its discretion in relying on these factors in granting an attorney-fee enhancement.

Under *Johnson*, a trial court may appropriately consider "the experience, reputation, and ability of the attorneys." *Blanchard*, 489 U.S. at 91 n.5 & 93. The district court stated that it did so when it noted that one of the reasons "an enhancement is appropriate" is that "Tomkowiak and Stanton did an excellent job at trial."

In considering whether an attorney-fee enhancement should be awarded, a district court may also consider "the novelty and difficulty of the questions" involved in the case. *Blanchard*, 489 U.S. at 91 n.5. The district court stated that it was doing just that when it held that an enhancement was warranted because this case involved "claims of discriminatory treatment in an area (residential mortgage lending) where discriminatory treatment is often difficult to prove."

Furthermore, the district court noted that it was granting an attorney-fee enhancement because "[t]he marshaling of evidence was an arduous and time-consuming task." The Supreme Court has held that the skill required to present a successful case is an appropriate ground for a trial court to consider in determining the reasonableness of the attorney-fee award. *Blanchard*, 489 U.S. at 91 n.5. (noting that the third *Johnson* factor takes into account "the skill requisite to perform the legal service properly").

Finally, in evaluating whether an attorney-fee award is reasonable, a district court may also consider "awards in similar cases." *Id*. The district court did so by concluding that an enhancement should be granted because "the hourly rates on which the 'lodestar' amount is computed are comparatively modest in light of prevailing rates in this area, and not out of

line with those awarded in similar cases." In addition to analyzing comparable cases, the district court also relied on the sworn affidavits of three attorneys, all of whom stated that the hourly rates on which the lodestar amount was based were below the market rate. We thus conclude that the district court did not abuse its discretion in awarding the successful plaintiffs an $80,000 attorney-fee enhancement. Because of our reversal of the district court's denial of Flagstar's motion for judgment as a matter of law with respect to the Paschals' claim, however, the attorney-fee enhancement will have to be recalculated on remand.

D. Expert witness fees and costs

Flagstar claims that the district court abused its discretion in failing to apportion a percentage of the requested expert witness fees and costs to the losing plaintiffs. In particular, Flagstar maintains that the court should not have granted $50,514.35 in expert witness fees for Martin Wing because his testimony pertained not only to the two successful sets of plaintiffs, but also to the three sets of plaintiffs whose claims were rejected by the jury. This same argument is put forth by Flagstar to challenge the $12,104.53 that the district court awarded in costs. Flagstar also contests $600 of the $1,350 in expert witness fees awarded for George Galster on the basis that he did not testify. Because it concedes that the district court's award of $23,569.12 in expert witness fees for Calvin Bradford did not include costs associated with his testimony for the sets of plaintiffs whose claims were unsuccessful, Flagstar does not challenge this component of the award.

Section 1988(c) provides that "[i]n awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee." 42 U.S.C. § 1988(c). As noted above, we will not disturb a district court's determination regarding the award of attorney fees and costs unless the court has abused its discretion. *Perotti v. Seiter*, 935 F.2d 761, 763 (6th Cir. 1991).

The district court stated that the expert witness fees for Wing should not be reduced because his "testimony was directed not to the specific defenses relating to particular plaintiffs but rather to the discriminatory nature of [Flagstar's] lending policies and substantially contributed to the success of the Edwards[es] and the Paschals at trial." In reaching this conclusion, the district court noted that the Supreme Court has held that where the facts or legal theories of different parties are interrelated, a district court does not have to apportion expenses mechanically on the basis of their success or failure. *Hensley*, 461 U.S. at 438. The district court also granted the plaintiffs all of the costs they requested because "there is no basis for the Court [to find] that these costs should be apportioned between the [successful plaintiffs] and the unsuccessful plaintiffs at trial. Indeed, it appears that even if only the [successful plaintiffs] proceeded to trial, these costs would still have been incurred." As to Galster, the district court did not state its reasons for granting $1,350 for his expert witness fee, which consisted of $750 for Galster's deposition and $600 for his potential appearance at trial.

We first turn to Flagstar's challenge to the fees regarding Wing. Unlike the evidence presented by Bradford,

none of Wing's testimony applied to specific plaintiffs. Instead, it focused on Flagstar's general lending practices. A review of the trial record and the billing invoices that Wing submitted confirm the general applicability of his testimony. Also, contrary to Flagstar's claim, $50,514.35 for Wing's service as an expert witness in this complicated case is neither patently unreasonable nor disproportionate to the damages awarded. We therefore conclude that the district court did not abuse its discretion in granting the successful plaintiffs $50,514.35 in witness fees for Wing.

The $12,104.53 in costs were also not apportionable between the five sets of plaintiffs. Although the plaintiffs filed documentation in support of their request for costs and included detailed entries in their fee petition for each cost, Flagstar has not contested any specific entry. After reviewing the fee petition and the supporting documentation, we find no reason to question the district court's conclusion that these costs were related to the efforts of the successful plaintiffs. We therefore conclude that the district court did not abuse its discretion in granting the successful plaintiffs $12,104.53 in costs.

Finally, Flagstar contends that the district court abused its discretion in granting the $600 portion of George Galster's expert witness fee that was billed for his potential appearance at trial, even though he was not called to testify. Because the district court did not think that Flagstar was contesting the plaintiffs' request for Galster's fee, the court did not fully discuss its reasons for granting the request. The district court did, however, point out that the plaintiffs "intended to call" Galster as a witness, but that "[t]he need for his testimony

was obviated by the ruling that defendant's expert could not testify."

We have not been able to find any Sixth Circuit case that directly addresses whether fees for nontestimonial expert services are compensable under 1988(c). The First and Fifth Circuits, however, have granted a request for expert witness fees in similar situations. *Piester v. IBM, Corp.*, 1998 WL 1267929, at 2 (1st Cir. May 14, 1998) (unpublished table decision) (holding that the district court did not abuse its discretion in granting attorney fees where the record fully supports a finding that the party reasonably expected to call the expert as a witness); *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1553 (5th Cir. 1984) ("Although courts do not ordinarily allow fees for witnesses who have not testified at trial, a court may award such a fee if the witness was ready to testify but extrinsic circumstances rendered his testimony unnecessary."). Because Galster was hired to be an expert witness, and he would have testified if the district court had not excluded the testimony of Flagstar's expert witness at the tail end of the trial, we conclude that the district court acted within its discretion in granting the successful plaintiffs the expert witness fees for Galster.

Perhaps none of these expert witness fees and miscellaneous costs will be affected by the fact that we have reversed the judgment in favor of the Paschals. This is an issue, however, that the district court may consider upon remand if an appropriate objection is made by Flagstar.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the district court's calculations of these various items, but **VACATE** the award and **REMAND** the case for the court to reduce the attorney fees and interest to account for the fact that only the Edwardses have ultimately prevailed in this litigation, and to consider whether this fact will affect its award of expert witness fees and miscellaneous costs.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[Filed July 19, 2000]

No. 95-73844

Audra Carson, et al.,
Plaintiffs-Appellees,
v.
Flagstar Bank, FSB, a Federal Savings Bank,
Defendant-Appellant.

OPINION: DECISION ON POST-TRIAL MOTIONS*

This is a housing discrimination case (mortgage lending) brought under sections 805 and 818 of the Fair Housing Amendment Act of 1988, 42 U.S.C. § 3605 and § 3617, and corresponding regulations promulgated by the Department of Housing and Urban Development pertaining to mortgage lending, 24 C.F.R. §§ 100.120 to 100.130, as well as the Civil Rights Act of 1866 and 1870, 42 U.S.C. § 1981

and § 1982, and section 504 of Michigan's Elliot-Larsen Civil Rights Act, M.C.L. § 37.2504.

In general, plaintiffs claim that they were the subjects of racial discrimination in the manner in which defendant Flagstar Bank (Flagstar), a mortgage bank, handled their mortgage loan applications or in the way the terms and conditions of their mortgage loans were set. The Memorandum and Order of August 14, 1998 briefly describes the background of the case.

Five sets of plaintiffs went to trial:

Audra Carson (Carson) claimed she was the victim of racial discrimination in the manner in which her application for a mortgage loan was handled. She did not close with Flagstar.

Paquita Davis-Friday (Davis-Friday) claimed she was the victim of racial discrimination in the manner in which her application for a mortgage loan was handled. She did not close with Flagstar.

Heath Thomas (Thomas) claimed he was the victim of racial discrimination in the manner in which his application for a mortgage loan was handled. He did not close with Flagstar.

David Edwards and E. Stephanie Edwards, his wife, (the Edwards) claimed they were the victims of racial discrimination in the manner in which their efforts to refinance their mortgage loan with Flagstar was handled. The

Edwards eventually obtained a new mortgage loan from Flagstar.

Gerald Paschal and Lisa Paschal (the Paschals) claimed they were the victims of racial discrimination in the manner in which their application for a mortgage loan was handled. The Paschals were approved for a mortgage loan by Flagstar on terms considerably less favorable than for which they applied and eventually obtained a mortgage loan elsewhere.

Each of the plaintiffs is an African American.

Flagstar is a large banking institution operating in the Detroit metropolitan area and elsewhere and specializing in residential mortgage loans.

Plaintiffs' claims were tried to a jury in November of 1999. The jury returned a verdict in favor of Flagstar on the claims of Carson, Davis-Friday, and Thomas, and returned a verdict in favor of the Edwards and Paschals. Particularly, the jury found the Paschals proved by a preponderance of the evidence that their race or color was one of the reasons why they did not obtain a mortgage loan from Flagstar. The jury awarded the Paschals $ 250,000 in compensatory damages and $ 325,000 in punitive damages. As to the Edwards, the jury found that they proved by a preponderance of the evidence that their race and color was one of the reasons why they did not obtain a mortgage loan on their initial application with Flagstar. The jury awarded the Edwards $ 125,000 in compensatory damages.

II. The Pending Motion

Before the Court is Flagstar's motion for judgment as a matter of law, Fed. R. Civ. P. 50(b), or in the alternative for a new trial, Fed. R. Civ. P. 59, or in the alternative for a remittitur.

Briefly stated, Flagstar says that the evidence at trial was insufficient to support the jury's finding of racial discrimination and therefore it is entitled to a judgment as a matter of law. Alternatively, Flagstar says that at a minimum, it is entitled to a new trial because the evidence was insufficient both as to liability and damages, or says that a remittitur on damages is appropriate because the amounts awarded by the jury, both compensatory and punitive, were grossly excessive.

After a thorough review of the record, albeit short of that which would have occurred had the Court been the fact finder, as the Court is not retrying the case, the motion will be denied in all respects.

III. The Trial

This was a long, complex, and hotly contested case. The trial extended over 14 days. Thirteen witnesses testified in plaintiffs' case, including Carson, Davis-Friday, Thomas, Gerald Paschal and E. Stephanie Edwards, loan officer employees of Flagstar, the chief financial officer of Flagstar, Calvin P. Bradford (Bradford), an expert in reviewing and comparing mortgage loan files, Marvin M. Wing (Wing), an expert in econometrics, Clifford D. Schrupp (Schrupp), the director of the Detroit Fair Housing Center, and a tester.

Plaintiffs introduced scores of documents into evidence, including plaintiffs' application files with Flagstar, other customer files of mortgage loans with Flagstar, correspondence and guidelines, underwriting standards, testing data and data provided to the government by Flagstar under the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. §§ 2801 et seq., commonly known as HMDA data. The customers' files consisted of applications, credit reports, employment verifications, approval and rejection letters, conditional approval letters, internal correspondence, memoranda and the like.

Flagstar called 16 witnesses, including underwriters, processors, loan officers, branch managers, senior executives in charge of underwriting and compliance, Dr. Edward Rothman, an expert in statistics, and an appraiser. Flagstar's exhibits, by and large, were similar to the exhibits introduced by plaintiffs.

IV. The Rule and Law Generally

A. Motion for Judgment as a Matter of Law: Fed. R. Civ. P. 59

The principles governing a motion for judgment as a matter of law are best stated by the Court of Appeals for the Sixth Circuit in *Morelock v. NCR Corporation*, 586 F.2d 1096, 1105 (6th Cir. 1978), as follows:

> The issue raised by a motion for judgment n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury. . . . the trial court may neither weigh the evidence,

> pass on the credibility of witnesses, nor substitute its judgment for that of the jury.
>
> . . . .
>
> The motion should not be granted unless the Court, after so viewing the evidence, "is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion . . . ."

B. Motion for a New Trial: Fed. R. Civ. P. 59

1. The Sufficiency of the Evidence

The principle governing a motion for a new trial is best stated in Wright and Miller, as follows:

> It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of the type now being considered. Necessarily all formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the other hand, the trial judge does not sit to approve miscarriages of justice. The judge's power to set aside the verdict is supported by clear precedent and common law and far from being a denigration or a usurpation of a jury trial, has long been regarded an integral part of jury by trial as we know it. On the other hand, a decent respect

> for the collective wisdom of the jury and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of its own doubts on the matter. Probably all that the judge can do is balance these conflicting principles in light of the facts of the particular case. If, after having given full respect to the jury's findings, the judge on the entire evidence is left with a definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2806 (2d ed. 1985). *See also Clay. v. Ford Motor Co.*, 215 F.3d 663, 2000 WL 834214 (6th Cir. June 28, 2000) (holding that "a district court must compare and weigh the opposing evidence and it must set aside the verdict if it determines that the verdict is against the clear weight of the evidence.") (citation omitted).

2. The Size of the Verdict

Wright and Miller is also instructive as to the size of a verdict, stating as follows:

> A motion under Rule 59 is an appropriate means to challenge the size of the verdict. The Court always may grant relief if the verdict is excessive or inadequate as a matter of law, but this is not to limit the Court's power. It may

> also grant a new trial if the size of the verdict is against the weight of the evidence.
>
> This is merely a special application of the general power of the trial court to set aside a verdict that is against the weight of the evidence, and the general principles developed in the preceding section are applicable, to a motion on this ground. The court is not free to set aside the verdict merely because the judge might have awarded a different amount of damages, but it may do so if the proceedings have been tainted by appeals to prejudice or if the verdict in the light of the evidence is so unreasonable that it would be unconscionable to permit it to stand. The phrase "shocks the conscious of the court," among others, is much used in the cases but adds very little by way of guidance. The power exists from the trial judge whether the verdict is unreasonably high or unreasonably low.
>
> There is a difference, however, that must be noted. If the Court finds that the verdict is unreasonably high, it may condition denial of a motion for a new trial on plaintiff's consent to a remittitur. If the verdict is too low, it may not provide for an additur as an alternative to a new trial.

11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2806 (2d ed. 1985).

3. Remittitur

In *Strickland v. Owens-Corning*, 142 F.3d 353 (6th Cir. 1998), the Sixth Circuit set forth the following standard for remittitur:

> A motion for new trial seeking a remittitur of a jury's verdict . . . should be granted only if the award clearly exceeds the amounts which, under the evidence in the case, was the maximum that a jury could reasonably find.

Id. at 357 (citing *Roush v. KFC Nat'l. Management Co.*, 10 F.3d 392, 397 (6th Cir. 1993)(citations and internal quotation marks omitted)).

In addition, in *Farber v. Massillon Board of Education*, 917 F.2d 1391 (6th Cir. 1990), the Sixth Circuit stated:

> As a general rule, this Court has held that "a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss.
>
> A trial court is within its discretion when remitting a verdict only when after reviewing all of the evidence in a light most favorable to the awardee it is convinced that the verdict is clearly excessive, resulted from passion, bias or prejudice, or so excessive or inadequate as to shock the conscience of the Court. If there

> is any credible evidence to support a verdict, it should not be set aside. The trial judge's determinations for -- the trial determinations are those of the jury. Moreover, it abuses its discretion in ordering either remittitur or new trial when the amount of the verdict runs upon conflicting evidence and the credibility of witnesses.

Id. at 1395 (citations ommitted). The Sixth Circuit also made clear that a remittitur, when appropriate, must offer a new trial as an alternative:

> Moreover, even if remittitur had been appropriate here, a forced remittitur without the offer of the option of a new trial on the issue of damages constitutes error, requiring this court to reverse and reinstate the verdict."

Id. at 1396.

4. Determination of Excessiveness

As to the determination of excessiveness, the court in *Darby v. Heather Ridge*, 827 F. Supp. 1296, (E.D. Mich. 1993), a housing discrimination case, said:

> One factor to be considered in determining whether to set aside an award of damages is whether the award is out of line with awards in similar cases. The court is fully aware that "the assessment of damages, especially for intangible harms, such as humiliation and

> distress, is inescapably judgmental and subjective to a large degree, and to that degree therefore discretionary." The Court is also mindful of the Sixth Circuit's admonition to appellate courts that they "should not attempt to reconcile widely varied past awards for analogous injuries 'which in the abbreviated appellate decisions of them seem somewhat similar.'

Id. at 1299-1300 (internal citations ommitted).

5. Punitive Damages - Excessiveness

Two cases from the Supreme Court of the United States are instructive on the question of excessiveness when it comes to punitive damages. First, in *Browning Ferris Ind. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989), the Supreme Court said: "Federal law .. will control on those issues involving the proper review of the jury award by a federal district court . . . " Second, in *BMW of North America v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), the Supreme Court set down the rule on the excessiveness of punitive damages when it said the following:

> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. . . . .Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone

> of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

Id. at 568 (citations omited).

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." *Id.* at 576 (citations omitted).

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.

Id. at 580 (citations omitted).

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness.

Id. at 583 (citations omitted).

C. Fair Housing

The plaintiffs' case, as previously described, is based on a violation of the Fair Housing Act of 1968 as amended, 42 U.S.C. § 1981 and § 1982. The most recent case to expand on these laws in a discrimination context is *Alexander v. Riga*, 208 F.3d 419, (3d. Cir. 2000), where the Court of Appeals for the Third Circuit said:

> The Fair Housing Act was intended by Congress to have "broad remedial intent." As this case stands after trial, the net result of the plaintiffs' victory was that they were out of pocket for the expenses of litigation. Historically enforcement of the civil rights statutes depends largely on the willingness of the private plaintiffs to pursue individual cases. The Supreme Court has attached importance to each individual's prosecution of discrimination cases under the statutes: The objectives of the [discrimination statutes] are furthered when even a single [individual] establishes that [another individual] has discriminated against him or her. The disclosure through litigation of incidents and practices that violate national policies respecting nondiscrimination . . . is itself-important.

Id. at 425-26 (citation omitted).

. . . .

> And, with respect to the Fair Housing Act in particular, the Supreme Court has held that since the enormity of the task of assuring fair housing makes the role of the [United States] Attorney General in the matter minimal, the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also "as private attorneys

> general in vindicating a policy that Congress considered to be of the highest priority.
>
> . . . .
>
> Here, there is a specific damages provision in the plain language of the statute. 42 U.S.C. 3613(c) provides the relief which may be granted when, as here, private individuals seek to enforce the Fair Housing Act: (1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred . . . , the Court may award to the plaintiff actual and punitive damages and . . . may grant as relief . . . .

Id. at 430 (citation omitted).

> . . . .
>
> The standard for punitive damages in a federal civil rights action was set by the Supreme Court and does not require "outrageousness". A jury may assess punitive damages in [a civil rights action] when the defendant's conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others.

Id. at 430-31 (citation omitted).

. . . .

> "Malice" and "reckless indifference" in this context, however, refer not to the egregiousness of the landlord's conduct, but rather to the landlord's knowledge that it may be acting in violation of federal law.

Id. at 431 (citation omitted).

V. The Law of the Case

Neither party took exception to the jury instructions. Accordingly, the jury instructions are a proper statement of the law of the case. The jury was instructed as follows:

> A. Liability
>
> It is unlawful for a mortgage lender, such as Flagstar Bank, to refuse to process or make a loan for the purchase or refinancing of residential real estate to a mortgage applicant based on the person's race or color.
>
> In this connection, it is also unlawful in the making of mortgage loans to impose different terms of conditions because of a person's race or color. Unlawful conduct includes, but is not limited to, the type of loan, interest rate, or down payment because of the race or color of the applicant.
>
> Each of the Plaintiffs' case must be considered separately.

In this case, Plaintiffs (1) Audra Carson, (2) Heath Thomas, (3) Paquita Davis-Friday, (4) Gerald and Lisa Paschal, and (5) David and E. Stephanie Edwards, each claim that Defendant Flagstar Bank unlawfully discriminated against them in failing to approve their mortgage applications or request for pre-qualification; approved their mortgage applications on discriminatory terms and conditions; or failed to close on their mortgage approval. Flagstar Bank denies the claims. It is your responsibility to decide whether each Plaintiff, or set of plaintiffs in the case of the Paschals and the Edwards, has established his or her claim against Flagstar Bank by a preponderance of the evidence.

A Plaintiff to recover must show that Flagstar Bank discriminated against him or her. A Plaintiff, however, is not required to produce direct evidence of discrimination. Discrimination may be inferred from the existence of other facts.

The law prohibits all forms of discrimination, sophisticated as well as simpleminded, and this disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hindrance, and special treatment may be considered evidence of discrimination.

You have been shown statistics in this case. Statistics are another form of evidence from which you may find, but are not required to find, that the Flagstar Bank discriminated against a Plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether a Plaintiff in this case has proven that Flagstar Bank discriminated against that plaintiff as charged.

Liability can be found if race is only one factor, rather than the sole factor in the refusal to grant or close on a mortgage request, or a request for the pre-qualification for a mortgage.

In the context of this case, a "tester" is a person who without an intent to obtain a mortgage, poses as a mortgage applicant for the purpose of collecting evidence of lending practices.

Evidence of testing activities, if otherwise found to be credible, is an appropriate method of demonstrating conduct on a defendant's part. The fact that a tester may not have given the defendant accurate information, end the fact that he or she may have approached a loan officer or other employee of the defendant without any intention of obtaining a mortgage, are not factors that impair the tester's credibility as a witness.

It is not a defense to liability that Flagstar Bank may not have discriminated against others on the basis of race or color. The law focuses on eradicating discrimination against individuals. If Flagstar Bank discriminated against a Plaintiff, it is not defense that Flagstar Bank did not discriminate against other individuals based on race or color.

In this case, Flagstar Bank is a corporation. A corporation can only act through its offices, directors, agents, and employees. In this case, it is admitted that the officers, directors, agents and employees of the corporation were engaged in the business of the corporation when they took the actions at issue in this case. Therefore, you should consider Flagstar Bank to be responsible for each of the actions taken by its officers, directors, agents, and employees, which were within the scope of their agency. If you find that the officers, directors, agents, and employees of Flagstar Bank, acting within the scope of their agency, violated the law, then you must find that Flagstar Bank violated the law.

B. Compensatory Damages

If you find in favor of Plaintiff then you should award him or her such actual and compensatory damages as you find, from a preponderance of the evidence, were proximately caused by the acts of Flagstar

Bank in refusing to approve and close on the Plaintiff's mortgage application or pre-qualification request, or refusing to negotiate for the approval of the Plaintiff's mortgage application, or otherwise refusing to make the mortgage loans unavailable or discouraged or denied the mortgage loans to the Plaintiff.

If you find that a Plaintiff was unlawfully discriminated against by Flagstar Bank, you are also to consider whether and to what extent he or she suffered any emotional injury as a result of that discrimination. With regard to emotional injury, you may compensate a Plaintiff for any humiliation, embarrassment, mental anguish, or emotional distress that he or she experienced or may in the future experience as a result of any discrimination that you find from the evidence. This type of relief is called compensatory damages.

In this regard, you may consider that discrimination based on race is an affront of which embarrassment and humiliation are natural consequences. Thus, you may infer emotional injury from such conduct. In addition, of course, you should consider on this question the testimony of the witnesses and any evidence of mental or emotional injury.

C. Punitive Damages

If you award compensatory damages, then you may award punitive damages. If you find that Flagstar Bank unlawfully discriminated against a Plaintiff, and also find, from a preponderance of the evidence, that the acts of Flagstar Bank were "maliciously" or "wantonly" or "oppressively" done, then you may award a Plaintiff punitive damages in addition to actual damages. If you award punitive damages, these damages must be separately stated in your verdict.

The law permits, but does not require, the jury in certain cases to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

An act or failure to act is "maliciously" done if prompted or accompanied by ill will, or spite, or a grudge either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.

An act or failure to act is "wantonly" done if done in reckless or callous disregard of or indifference to the rights of one or more persons including the injured person.

An act or failure to act is "oppressively" done if done in a manner which injures or damages or otherwise violates the right of another person with unnecessary harshness or severity by a misuse or abuse of authority or power or by taking advantage of some weakness or disability of the misfortunes of another person.

Whether or not to make an award of punitive and exemplary damages in addition to actual damages is a matter exclusively within the province of the jury if you unanimously find, from a preponderance of the evidence in the case, that Flagstar Bank's acts of omissions which caused actual damage to a Plaintiff were maliciously or wantonly or oppressively done. But you should always bear in mind that such extraordinary damages may be allowed only if you first unanimously award a Plaintiff a verdict for actual or compensatory damages. You should also bear in mind not only the conditions under which and the purposes for which the law permits an award and punitive and exemplary damages, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be awarded, or fixed in any amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

> In assessing damages, you should bear in mind that the purpose of punitive damages is not to compensate the injured party. Rather, punitive damages are awarded to punish a defendant and to serve as an example and a warning to others not to engage in such conduct.
>
> If you determine that it is appropriate to award punitive damages, you should consider several factors in determining what amount of such damages will serve as an appropriate penalty against Flagstar Bank and as a deterrent to others. These factors include Flagstar Bank's financial status, Flagstar Bank's motivations, and the degree of purposefulness of willfulness of Flagstar Bank's actions.
>
> If you award punitive damages, you should determine the amount (if any) of punitive damages based on the degree of wrongdoing and the financial status of Flagstar Bank.

VI. The Evidence at Trial

A. Generally

The evidence at trial to establish liability consisted of the following: (1) the history of the Paschals' and the Edwards' efforts to obtain mortgage financing, which in the case of the Paschals was for a new mortgage, and in the case of the Edwards was for refinancing an existing mortgage; (2) a study of comparable files on the basis of relevant facts in each file, such as type of loan, application date, time periods,

Flagstar's policies, and underwriter response, and facts relating to comparability and additional relevant facts; (3) analysis of collective data on the basis of type of loans, range of loans, racial and financial profiles of borrowers, rates of rejections and the like submitted to federal agencies; and (4) testing data.

Bradford expressed the opinion that white applicants and borrowers were treated more favorably than the Paschals and Edwards. *See* Px43, Comparable Loan File Analysis. Wing expressed the opinion that there was a significant difference in rate of denial for white applicants and African-American applicants in favor of white applicants. See PX39, Report on Statistical Evidence of Racial Disparities in Home Mortgages Lending. Bradford and Wing were vigorously cross-examined.

The testing data as explained by Schrupp displayed evidence of discrimination.

Flagstar employees testified on how mortgage loan applicants were processed from initiation by mortgage loan offices, the gathering of relevant data by processors, and approval or rejection of applications by underwriters. Underwriting standards were thoroughly explored. Flagstar employees also testified as to the lack of any initiative or response by Flagstar when it was disclosed to Flagstar that there may be discrimination in its mortgage loan processing.

B. The Paschals

The Paschals' application for a mortgage loan was prompted by their purchase of a new home then under

construction. Their initial loan request was turned down because of a two year old bankruptcy and that they had not yet sufficiently established credit. After, Flagstar offered them a mortgage loan on substantially less favorable terms than requested, the Paschals went elsewhere.

The application process extended from May 30, 1992 to November 4, 1992, five months and four days. The Paschals first applied for a $ 75,000 mortgage at a 5.625 percent interest rate for 30 years. There were five iterations of a proposed mortgage loan. Ultimately, Flagstar offered a $ 55,000 mortgage for 30 years at a 16.5 percent interest rate.

Bradford opined, based on his evaluation of the salient factors involved in the Paschals' application, that comparable white applicants obtained mortgage financing from Flagstar, i.e., applicants with the same credit history. This led Bradford to conclude that the Paschals received different and adverse treatment in comparison to the treatment received by white applicants and that the determinant variable was the race of the Paschals.

Mrs. Paschal did not testify. There was no direct evidence of discrimination. The Paschals did not suffer economic damage.

As to non-economic damages, the Paschals' papers contain the following accurate description of the evidence adduced at trial:

> In 1992, the Paschals sought a larger home for their family. The selected a location in Ypsilanti, Michigan, for the construction of

their family's first home. On June 2, 1992, the Paschals felt "positive" after their meeting with loan officer Dave Reed who, after reviewing the Paschals' qualifications, pre-qualified them for a $ 75,000 mortgage, at just over 10% and an initial adjustable interest rate of 5.625%.

On approximately June 18, 1992, Reed again assured the Paschals that they had a good application, and arranged for authorization to be sent to the builder for construction of the home. On June 20, 1992, the Paschals entered into a sales agreement for the construction of the home.

From late June to approximately July or August 1992, the Paschals, as a family, drove by the home each day. They met, and apparently began to form relationships, with neighbors in the new subdivision. In approximately late July or early August 1992, Reed informed the Paschals of Flagstar's formal approval of their loan application.

At this point, the Paschals would naturally have anticipated the completion of their home, the closing on their mortgage with Flagstar, and their family's settling into their home. Gerald Paschal testified at trial that he and his wife had told family members and friends about the home, which is what anyone would have done in their situation.

At this point, however, the Paschals' ordeal started. At the end of August 1992, Reed learned of Flagstar's sudden rejection of the Paschals' loan request, and the bank's counter-offer of a $ 55,000 loan amount. This required a down payment of $ 30,000 or 35% of the $ 85,000 purchase price of the home.

Gerald Paschal, and his wife, were "stunned" by the bank's actions, especially after the repeated assurances of mortgage approval. The $ 55,00 loan amount would require the Paschals to pay $ 30,000 or more from their liquid assets, depleting the Paschals of savings that otherwise would be available for any unexpected financial need.

Appreciating the Paschals' vulnerable situation, Reed himself "panicked" and desperately tried to "fix" the situation for the Paschals, and save their home. In approximately early September 1992, Reed took the Paschals' file to Mortgage Solutions. Gerald Paschal, in turn, spoke to Denise Prat at Mortgage Solutions, and was relieved to learn that, based on the information int eh Paschals' loan file, Pratt could preliminary approved the Paschals for a 30-year $ 75,000 mortgage, at a fixed 7.99% interest rate.

The next day, however, Gerald Paschal learned that Mortgage Solutions had been forced by Flagstar to withdraw their

preliminary mortgage approval. Flagstar also retaliatorily fired Reed for taking the Paschals' file to Mortgage Solutions. At this point, the Paschals were again confronted with the loss of their home -- and no doubt dismayed at Flagstar for actively working against them.

Lacking any alternative, the Paschals, on or about September 24, 1992, returned to Flagstar's branch office location. At the branch office, the Paschals met with a new loan officer, who sarcastically "congratulated" them on their "approval" for a mortgage in the amount of $ 59,600 (just $ 4,600 more than the utterly insufficient $ 55,000 loan amount). This still required a 30% down payment. More importantly, the "approval" required the Paschals to pay an outrageous 16.490% interest rate on the loan, along with $ 596 in costs and up to 10 points.

As Steve Brooks, Flagstar's branch manager, testified at trial, the effective interest rate for such a loan, including costs and points, would be 18% to 19%. The jury could infer that Gerald Paschal, who had a college degree in accounting and worked as an accountant, would be outraged by the "credit card" kind of interest rate insisted upon by Flagstar.

The Paschals were "devastated" by the apparent loss of their home. Yet they could not outright decline the outrageous terms since

> rejection of the proposed loan would result in apparent loss of the home, particularly after they had told family members and friends about their new home. Facing reality, the Paschals, a few days later on September 29, 1992, decided to withdraw their loan application with Flagstar.
>
> Although fired by Flagstar, Reed continued to help the Paschals save their home. Reed subsequently took the Paschals' loan file to N.V. Phillips & Co./Executive Mortgage ("N.V. Phillips"). On January 30, 1993, a full five months after Flagstar's discriminatory rejection of their original application, the Paschals closed on a mortgage for their home.
>
> Yet the January 30, 1993, closing did not completely end of the Paschals' ordeal. The N.V. Phillips mortgage would increase to 12.750% percent after 6 months, and potentially increase to 18% over the term of the mortgage. As a result, Reed arranged for the Paschals' refinance of their mortgage, which took place on or before July 30, 1993.
>
> . . . .

Plaintiffs' Supplemental Exhibit 6, entitled Narrative Statement of Testimony Relating to Damages as to the Paschals.

C. The Edwards

The Edwards wanted to refinance their home mortgage with Flagstar because of a favorable change in interest rates. Their home was purchased in 1988 new for $ 110,000. In mid-1994, the Edwards applied for a mortgage loan of $ 89,300. The appraisal came in at $ 94,000, which did not allow for a $ 89,300 mortgage. There was no explanation for why the home dropped in value. Flagstar made no effort to rationalize the current appraisal with the initial purchase price. In May 1994, the application was rejected on grounds of insufficient funds to close, inadequate collateral, and "do not grant credit on terms requested." The Edwards made a second application, which Flagstar rejected in September 1994. Finally in November 1994, on a third application, the Edwards financed their existing mortgage with a 30 year mortgage at a 10.875 percent interest rate. The terms of the new mortgage, because of its 30 year length, were less favorable than those requested in the initial application.

The mortgage loan application process extended over eight months and ten days. It began with an application for a $ 90,000 15-year mortgage at a 7.875 percent interest rate and ended up with an $ 83,900 mortgage for 30 years at a 10.875 percent interest rate. There were three iterations. For the final mortgage the monthly payments were essentially the same as the original application. The difference, however, is a 30 year term instead of a 15 year term.

Bradford opined, based on his evaluation of the salient factors involved in the Edwards' application, that comparable white applicants obtained mortgage financing from Flagstar. This led Bradford to conclude that the Edwards' received

different and adverse treatment in comparison to the treatment received by white applicants and that the determinant variable was the race of the Edwards.

Mr. Edwards did not testify. There was no direct evidence of discrimination. The Edwards' did not suffer economic damage.

As to non-economic damages, the Edwards' papers likewise contain an accurate summary of the evidence adduced at trial, as follows:

> The Edwards applied with Flagstar, on March 11, 1994, for a 15-year mortgage refinance, at a conforming 7.875% fixed interest rate. By June 1994, the Edwards, realizing they were fully qualified to obtain mortgage approval on the terms applied for, were frustrated by Flagstar's delays and refusal to provide a 15-year mortgage at the requested interest rate. By this time, the Edwards began to suspect they were being discriminated against by Flagstar. Moreover, according to Stephanie Edwards, she and David Edwards had become upset to the point of having difficulty sleeping at night.
>
> The Edwards' disappointment and frustration with the treatment they received from the bank continued through November 1994. During this period, they were forced into a 30-year mortgage, and had their interest rate increased at first to 9.50%, and then to 10.875%. They

> continued to have difficulty sleeping at night. As the months wore on, their frustration and disappointment grew into anger.
>
> Finally, looking back at the humiliating treatment they received from Flagstar in the eight month period from the time of their original application to the date of closing, the Edwards felt the bank treated them as second class citizens due to their race.

Plaintiffs' Supplemental Exhibit 5, entitled Narrative Statement of Testimony Relating to Damages as to the Edwards.

D. Flagstar

Flagstar vigorously cross-examined each of the plaintiffs who testified and the Flagstar witnesses called by plaintiffs. Flagstar's witnesses walked through each of the plaintiffs' files explaining the reasons for actions taken and for rejecting applications or less favorable terms offered than for which initially applied. These witnesses also testified to the various underwriting guidelines and standards applicable to the several applications involved. Flagstar took Issue with Bradford's comparable, and the salient factors in the files he analyzed, as not being comparable. Wing's conclusions as to the HMDA data were also challenged. Lastly, Flagstar's senior executive explained the way in which mortgage applications were processed, compliance studies, and their efforts to ensure that fair lending principles were followed.

There was a thorough vetting of Flagstar's operations, particularly with regard to plaintiffs' application process, Bradford's comparables, as well as Flagstar's practices in general.

VII. Decision on Liability

A. Judgment as a Matter of Law: Procedural

It is well established that in order for Flagstar to make a motion for judgment as a matter of law it must have first moved at the conclusion of proofs for a dismissal in a reasoned motion. *See* Jones, Rosen, Wegner & Jones, Rutter Group Practice Guide: Federal Civil Trials and Evidence 13-7 (The Rutter Group 1999); *American & Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 160 (6th Cir. 1997). It is disingenuous for the Paschals and the Edwards to argue that Flagstar failed to do so. At the close of the proofs the following colloquy took place:

> The Court: You are making a motion for judgment as a matter of law, right?
>
> Mr. White: [Flagstar's counsel]
>
> Directed verdict, Your Honor.
>
> The Court: It's called judgment as a matter of law.
>
> . . .

The Court: For all of the reasons known to the law, right?

Mr. White: For all those, Your Honor.

. . .

The Court: Let me offer you a thought. This case pictures, more than anything else, frustrated expectation on the part of the mortgage borrowers occasioned in part by questionable creditworthiness, in part by slow response to underwriting questions raised by lenders during the course of loan processing, and perhaps other factors. The record contains no direct evidence of racial discriminatory treatment. The chain of circumstances pointing to the conclusion that the plaintiff borrowers were treated differently than comparably situated white applicants is, considering the multitude involved, rather weak. However, it is sufficient to make out a case for jury decision. Accordingly, the motion for judgment as a matter of law is denied.

Mr. White: Your Honor, would you consider a brief?

The Court: What brief?

Mr. White: I didn't get a chance to file one.

Tr. 11/17/99; pp. 58-59.

The Court clearly did not allow Flagstar to be more specific with regard to the grounds it relied on for its motion, and the Paschals and Edwards clearly did not object to the manner in which the Court handled the motion.

B. Judgment as a Matter Of Law: Substantive

There is no basis for a judgment as a matter of law in favor of Flagstar. The evidence in a light most favorable to the Paschals and Edwards supports the jury's verdict that both parties proved by a preponderance of the evidence that race was a factor in the way in which Flagstar dealt with each of them.

This evidence included: Bradford's conclusions that the only variable in their treatment by Flagstar compared to white applicants was that they were treated less favorably because of their race; the HMDA data which generally proved that Flagstar acted with a discriminatory animus; and the testing data which displayed a discriminatory animus.

The record clearly supports the conclusion that the jury could reasonably have found that both the Paschals and the Edwards were victims of racial discrimination, i.e. that they were treated differently and less favorably than similarly situated white applicants and that the only variable in the comparable experience was race. As to the Pachals, the finding is evidenced in the ultimate rejection of their mortgage loan. As to the Edwards, the finding is evidenced in the extended time it took them to close on a mortgage loan, and the considerably less favorable terms and conditions of the ultimate mortgage.

C. New Trial

In viewing the evidence in a light most favorable to the Paschals and Edwards, the Court has no firm conviction that there is an injustice in the liability verdict or that it is a mistake to allow the liability verdict to stand. The sequence of events, the length of time, the comparable data, the HMDA data, the testing data, all support the conclusion that the verdict was certainly one which a jury could reasonably have come to as to liability. It is also not a verdict which exhibits any bias, prejudice or passion.

VIII. Decision on Damages

A. Compensatory Damages

It is perfectly clear that there should not be a completely new trial on the grounds of excessiveness of the damages. Therefore, the only question is whether there should be a remittitur. The test is not what the Court would have awarded; but what the jury did award. The jury's damage verdict was not out of line. This was not a runaway jury.

The parties have cited a number of cases in which there were damage awards for discrimination. These cases cover both compensatory damages and punitive damages. Attached as Appendix A is a breakdown of these cases displaying in tabular form the nature of conduct, injury, the amount of compensatory damages awarded, the amount of punitive damages awarded, judge or jury, and a scoring of them as to the level of harm to the plaintiff on a scale of 1 to 10 and the level of defendant's conduct on a scale of 1 to 10. Based upon this analysis the compensatory damages awarded

by the jury are not excessive or out of line with awards in similar cases.

B. Punitive Damages

As to punitive damages, the jury had a right to consider Flagstar's financial status and award an amount large enough to act effectively as a deterrent. Considering the evidence at trial, moreover, the jury could reasonably have found from the testing and statistical evidence, that Flagstar violated established underwriting guidelines. The jury could also have found that Flagstar did not adequately report its HMDA data loan denials. The jury could have taken into consideration Flagstar's lack of fair lending training and its management's failure to effectively discipline loan officers known to have made blatantly racial statements. Particularly with regards to the Paschals, Flagstar knew their need for mortgage financing, and the final mortgage terms offered were so far out of line with what they reasonably needed or could have afforded as to have been illusory. In sum, the award for punitive damages to the plaintiffs was also within a range that does not allow for disturbance by the Court.

IX. Conclusion

There is no good reason to set aside the jury's verdict. There is no good reason to require a retrial. There is no good reason to reduce the jury's verdict.

Accordingly, Flagstar's motion is DENIED.

SO ORDERED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[Filed August 18, 1998]

No. 95-73844

Audra Carson, et al.,

Plaintiffs-Appellees,

v.

Flagstar Bank, FSB, a Federal Savings Bank,

Defendant-Appellant.

MEMORANDUM AND ORDER

I. Introduction

This is a housing discrimination case. Plaintiffs assert that defendant Flagstar Bank, FSB, f/k/a First Security Savings Bank (Flagstar), discriminated against them by not allowing them to secure or refinance mortgage loan. A typical act of discrimination alleged in the complaint involves a married couple applying to Flagstar for refinancing or for a mortgage loan to purchase a house. The application was

denied, supposedly either because the applying couple was African-American or interracial or because the couple, though white, sought to purchase a house located in Detroit, Michigan. Plaintiffs base their claims on the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*; 42 U.S.C. §§ 1981 & 1982; and the Michigan Elliot-Larsen Civil Rights Act, M.S.A. § 3.548 *et seq.*

Flagstar now moves for partial summary judgment as to some of the claims, arguing that the events underlying these claims occurred outside the statute of limitations. Flagstar specifically seeks to dismiss the claims of William and Theresa Weld-Wallis (the Weld-Wallises); Michael and Janice Nobliski (the Nobliskis); Gerald and Lisa Paschal (the Paschals); and Daniel and Regina Nicholas (the Nicholases). Plaintiffs respond that these claims are still valid under the continuing violations doctrine because Flagstar engaged in a pattern and practice of housing discrimination.

For the following reasons, Flagstar's motion for partial summary judgment will be granted in part and denied in part.

II. Statute of Limitation Defense

A.

The complaint was filed on September 21, 1995. The plaintiffs' claims of which Flagstar seeks dismissal are:

The Weld-Wallises

On June 22, 1988, the Weld-Wallises, who are white, applied to Flagstar for a mortgage loan to purchase a Detroit house. Their application was denied on September 21, 1988. The WeldWallises lodged a complaint with intervening plaintiff the Fair Housing Center of Metropolitan Detroit (FHC) on February 13, 1989. The FHC referred them to an attorney, Michael Olshan (Olshan), who sent the Weld-Wallises a letter requesting that they stop by to discuss the case. The Weld-Wallises apparently never followed up on the letter.

The Nobliskis

In 1990, the Nobliskis-one of whom is white and one of whom is African-American-applied for a mortgage loan with Flagstar, which was approved. On October 29, 1991, the Nobliskis applied to Flagstar for a refinancing of their loan. Flagstar denied their application to refinance in February 1992. On May 21, 1992, the Nobliskis filed a complaint with the FHC, which sent out testers to Flagstar. Olshan also worked on this case, and from his notes, it appears that he believed the Nobliskis' claims were outside of the relevant statute of limitations. Nothing came of the Nobliskis' initial complaint.

The Paschals

The Paschals, both African-American, applied for a mortgage loan with Flagstar in May 1992. Their application was denied on August 13, 1992, but they still had continuing contact with a Flagstar loan officer. On September 29, 1992,

the Paschals wrote Flagstar a letter withdrawing their loan application, alleging unfair treatment. The Paschals filed a complaint with the FHC on October 12, 1992. In November 1992, Flagstar granted the Paschals' request to withdraw their application.

The Nicholases[1]

The Nicholases are also both African-American. They applied for a mortgage loan in April 1992, and their application was denied on August 28, 1992. On August 31, 1992, Mr. Nicholas sent Flagstar a letter accusing Flagstar of discrimination.

B.

All of the triggering events in the claims of the Weld-Wallises, the Nobliskis, the Paschals, and the Nicholases – i.e., the dates on which their applications were denied – occurred more than two or three years before the filing of the complaint. These claims are clearly outside of the statute of limitations. *See* Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A)("An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . ."); *Marlow v. Fisher Body*, 489 F.2d 1057, 1063 (6th Cir. 1973)(applying three-year statute of limitations of M.S.A. § 27A.5805(8) to claims made under 42 U.S.C. § 1981);

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[1] The Nicholases became part of the case with the filing of the first amended complaint on October 27, 1995.

Slayton v. Michigan Host, Inc., 144 Mich. App. 535, 553 (1985)(applying the three-year statute of limitations of M.S.A. § 27A.5805(8) to claims made under the Michigan Elliott-Larsen Civil Rights Act, M.S.A. § 3.548 *et seq.*).

III. Continuing Violation Doctrine

In opposition to Flagstar's statute-of-limitations defense, plaintiffs assert that Flagstar had a continuing pattern and practice of discrimination, thereby tolling the statute of limitations for the otherwise time-barred alleged acts of discrimination. As the Supreme Court has stated:

> [A] continuing violation . . . should be treated differently from one discrete act of discrimination. Statutes of limitation . . . are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears. . . . [W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint [may be] timely . . . .

Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982)(citations omitted).

In order for these plaintiffs to fall within the continuing violation exception, however, each set of plaintiffs must have suffered some act of discrimination by Flagstar within the limitations period. No matter whether Flagstar

engaged in a far ranging pattern and practice of discrimination, a plaintiff does not have a right to recover unless the plaintiff suffered come act of discrimination within the limitations period. *See Dixon v. Anderson*, 928 F.2d 212, 217 (6th Cir. 1991)("It should be clear that without a specific, allegedly discriminatory act against [plaintiffs] within the limitations period, mere existence of an alleged policy of violating equal protection rights will not toll the running of the statute of limitations."). Such is not the case with the Weld-Vallises, the Nobliskis, or the Nicholases. All contact between these plaintiffs and Flagstar ceased more than three years before the filing of the complaint. As these claims are stale, these parties must be dismissed as plaintiffs.

The Paschals assert, however, that they suffered continuing acts of discrimination by Flagstar into the limitations period. On September 29, 1992 – which is within three years[2] of the filing of the complaint on September 21, 1995 – the Paschals wrote Flagstar a letter withdrawing their loan application on grounds of unfair treatment. Moreover, on November 4, 1992, Flagstar granted the Paschals' request to withdraw their application in a "Statement of Credit Denial, Termination or Change." These allegations are sufficient to allow the Paschals to invoke the continuing violation doctrine to toll the relevant statute of limitations; they continue as plaintiffs.

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[2] Because the Paschals' claim under the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), has a two-year statute of limitations, the Paschals certainly may not assert that claim. The Paschals have alleged no continuing contract with Flagstar within the two years preceding the filing of the complaint.

IV. Conclusion

For the foregoing reasons, Flagstar's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART. The Weld-Wallises, the Nobliskis, and the Nicholases are DISMISSED as plaintiffs.

The Paschals continue as plaintiffs; only their claims under 42 U.S.C. §§ 1981 and 1982, and the Michigan Elliott-Larsen Civil Right Act, M.S.A. § 3.548 *et seq.*, have vitality.

SO ORDERED.

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: August 14, 1998
Detroit, Michigan